United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7087

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,

Plaintiff-Appellee,

—against—

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

HOLTZMANN, WISE & SHEPARD
Attorneys for Defendant-Appellant
30 Broad Street
New York, New York 10004
(212) 747-5500

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
Attorneys for Plaintiff-Appellee
140 Broadway
New York, New York 10005
(212) 344-8000

UNITED STATES COURT OF APPEALS
FILED
MAY 3 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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JA 1

DOCKET

TATES DISTRICT COURT

Jury demand date:

73 CIV. 242

Form No. 105 Rev.

TITLE OF CASE	ATTORNEYS
WEBBER JACKSON & CURTIS INCORPORATED AGAINST, ILIARIA DELIA DE PUERTO RICO INC.	For plaintiff: DEWEY BALLANTINE BUSHBY PALMER & WOOD 140 Broadway, N.Y.C. N.Y. 10005 344-8000 9/20 For defendant: ~~WEISS ROSENTHAL HELLER SCHMIDT~~ ~~225 MADISON AVE.~~ ~~NEW YORK, N.Y. 10017 725-2700~~ Sub. 2-9-76 MILBANK TWEED HADLEY & McCLOY 1 Chase Manhattan Plaza-NYC 10005 (422-2660)

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
mailed X	Clerk		1/13	Chase 13	15 —	
			1/15/73	Cash		15 —
mailed	Marshal					
of Action: CONTRACT.	Docket fee			4		
	Witness fees					
Jury:	Depositions					

BEST COPY AVAILABLE

JA 2

CURTIS VS. IN... MELIA DE PUERTO RICO, ETC.

73 CIV. 2422

(PAGE #2)

JUDGE MOTLEY

DATE	PROCEEDINGS	Judgment
5-31-73	Filed Complaint. Issued Summons.	
6-1-73	Filed summons and entered Marshall's return. Served on: Martin Cohen on 6/4/73.	
6-6-73	Filed deft's ANSWER to the complaint.	WHP
9-26-73	Filed deft"s notice to take deposition of the pltff. on 9/25/73	
9-26-73	Filed pltff's request to produce.	
9-26-73	Filed pltff's notice to take deposition of deft. on 11-1-73.	
12-19-73	Filed pltff's affdvt. and notice of motion for an order directing that the allegations in this action be taken to be established for purposes of the action, etc. Ret. 12-26-73.	
12-19-73	Filed memorandum in support of pltff's motion to impose sanctions or to compel discovery.	
12-21-73	Filed deft's affdvt. of Richard F. Horowitz in opposition to pltff's motion pursuant to RULE 37.	
1-2-74	Filed pltff's affdvt. of Judson A. Parsons, Jr. in support of pltff's motion for an order providing sanctions.	
1-21-74	Filed memo endorsed on motion filed 12-19-73. Motion is referred to Magistrate Jacobs for assignment to a Magistrate for hearing and report as indicated. So ordered- MOTLEY, J. (m/n)	
rcd 1-5-74	Filed stip & order that all future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision and that the pending motion of pltff. to compel discovery or impose sanctions is resolved as indicated. So ordered- MOTLEY, J.	
2/15-74	PRE-TRIAL CONFERENCE HELD BY Schreiber U.S. Mag.	
2-17-74	Filed defts Affidavit & Notice of Motion for an order, transferring this action to the U.S.D.C. of Puerto Rico, etc. as indicated rtble. 4-22-74.	
2-17-74	Filed defts memorandum of law.	
2-23-74	Filed pltffs affidavit in opposition to the motion by def. for an order transferring this above entitled action to the U.S.D.C. of Puerto Rico etc. as indicated.	
2-23-74	Filed pltffs Affidavit (John De Saint Phalle,) in opposition to defts motion to transfer the above action to the U.S.D.C. of Puerto Rico etc. as indicated.	
2-23-74	Filed pltffs memorandum in opposition to defts motion etc. as indicated.	
2-25-74	Filed stip & order that the schedule, etc. of papers directed to deft's motion dated 4-12-74 is as follows: pltf's papers in opposition will be served on 4-23-74 and deft's reply papers will be served on 4-26-74. So ordered- MOTLEY, J.	
3-11-74	Filed memo endorsed on motion filed 9-26-73. The within motion is dismissed as moot. Motley, J.	
3-11-74	Filed Order- that those documents call for by pltff's request for production dated 9-25-73, including those documents specifically requested during the deposition of deft. held on 2-28 and 3-5-74 be produced on or before 12-15-74 and that- failing said production, it is the recommendation of the undersigned that deft's answer be stricken and judgment be entered for pltff. Schreiber, U.S. Mag.	
3-18-74	Pre-trial conference held before Schreiber, U.S. Mag.	
4-1-74	PRE-TRIAL CONFERENCE HELD BY Schreiber, U.S. MAG-	
4-1-74	PRE-TRIAL CONFERENCE HELD BY Schreiber, U.S. MAG-	
4-31-74	Filed Memorandum-Opinion #42124 and Order- for the reasons noted, deft's motion to transfer and change the location of the deposition are denied. Deft's application for leave to serve and file its amended answer is granted. So ordered- MOTLEY, J. (m/n)	(WHP)
5-10-74	Filed deft's Amended ANSWER	
5-13-74	Filed stip & order extending pltff's time to respond to the amended answer to 5-16-74. So ordered- MOTLEY, J.	
7-1-75	PRE-TRIAL CONFERENCE HELD BY Schreiber, U.S. Mag.	

(CONT'D - PAGE #3)

Civil Docket Continuation

DATE	PROCEEDINGS
May 22-75	Filed stip & order extending pltff's time to reply to the amended answer to 5-30-75. So ordered- MOTLEY, J.
June 4-75	Filed deft's affdvt. and notice of motion for an order permitting the firm of Weiss Rosenthal Teller & Schwartzman to withdraw as counsel of record for the deft. Ret. 6-13-75
June 4-75	Filed stip & order extending pltff's time to reply to the amended answerto 6-13-75. No further extensions will be approved by the Court except upon good cause shown by affdvt. So ordered- MOTLEY, J.
Jun16-75	Filed Pltffs Affidavit & Notice of Cross motion for an order directing that the allegations of the Complaint in this action be taken to be established for purposes of the action, that deft be precluded from opposing the claims asserted in the Complaint, that the amended Answer and Counterclaims included ther e in filed by Deft. in this action be stricken, and that Judgment be entered by default for Pltff, etc, a s indicated rtble before Motley, J. on 6-20-75.
Jun16-75	Filed Memorandum in support of pltffs Cross motion to impose sanctions purs to 37 (b) (2) and 37 (d) in opposition to defts Attys motion to withdraw as Counsel of Record.
Jun16-75	Filed Pltff Reply to Counterclaims.
June 18-75	Filed stip & order that the date on which the motion of attys. for deft. to withdraw as counsel of record is extended to 6-20-75. So ordered- MOTLEY, J.
June 20-75	Filed pltff's affdvt. of Bob D. Dennis pursuant to Rule 9(f) of the General Rules
06-17-75	PRE-TRIAL CONFERENCE HELD BY Schreiber U.S. Mag.
Sept.8-75	Filed memo endorsed on motion filed 6-4-75. The within motion to withdraw as counsel is referred to Mag. Schreiber for hearing and report as indicated...
Dec. 8-75	Filed pltff's notice to produce Motley,J...m/n
Dec. 8-75	Filed pltff's notice of taking deposition of deft. by Jack H. Berger on 01-13-76; by Martin Cohen on 01-14-76.
Jan. 12-76	Filed memo endorsed on cross-motion filed 6-16-75. The court regrets the proposed order prepared by Magistrate Schreiber in Dec. 9, 1975 and grants thepltff's motions for sanctions against defts. for their refusal to comply with the prior orders of this court to produce certain documents and to appear for the taking of deft's deposition. A judgment of default will be entered against defts. as provided by Rule 37 FRCP. Pltffs are directed to promptly submit an order. So ordered- MOTLEY, J. (m/n)
Jan. 15-76	Filed deft's affdvt. and notice of motion for an order reconsidering and vacating this Court's of 1-12-76. Ret. 01-23-76.
Jan. 22-76	Filed Order & Judgment # 76,061 on default-- the amended answer filed by deft. is stricken and the counterclaims aginst the pltff are dismissed with prejudice- the deft. is precluded from opposing the claims asserted in the complaint, etc.- a judgment by default against the deft. shall be entered by the Clerk in the amount of $265,000, plu interest, etc. plus reasonable expenses, including pltff's attys' fees, in the amount of $3,743.50 and that pltff shall file a bill of costs which shall be taxed against the deft. MOTLEY, J. Judgment entered- 1-22-76 Clerk (m/n)
02-09-76	Filed stip & order substituting attys. for deft. So ordered- MOTLEY, J.
02-13-76	Filed Bill of Costs as taxed in the am't of $613.11 in favor of pltff. and added to Judgment # 76,061.
02-20-76	Filed deft's notice of appeal to USCA from the order and default judgment entered on 1-22-76 and the ruling of 1-21-76. Copy mailed to: Dewey, Ballantino, Bushby, Palmer & Wood.
03-01-76	Filed Superseadeas Bond for undertaking on appeal in the sum of $383,110.54 Insurance Co of No. America.
03-11-76	Filed transcript of record of proceedings dated 1-21-76

(Continued on page 4)

DATE	PROCEEDINGS
ar 17-76	Filed Defendants reply memorandum of law.
ar 17-76	Filed Magistrate Schreiber's memorandum and order concerning pltff.motion for imposition of sanctions and deft cross-motion to be relieved.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,	INDEX# 73cv 2422
Plaintiff,	
-against-	COMPLAINT
INMOBILIARIA MELIA DE PUERTO RICO, INC.,	
Defendant.	

Plaintiff, Paine, Webber, Jackson & Curtis Incorporated, by its attorneys, Dewey, Ballantine, Bushby, Palmer & Wood, for its complaint alleges as follows:

1. Plaintiff is, and at all relevant times was, a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business in the State of New York.

2. Upon information and belief defendant is, and at all relevant times was, a corporation duly organized and existing under the laws of the Commonwealth of Puerto Rico, having its principal place of business in the Commonwealth of Puerto Rico.

3. Jurisdiction is based upon diversity of citizenship. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

4. On or about April 3, 1972 plaintiff and defendant entered into a contract, a copy of which is annexed as Exhibit A hereto. This contract was amended in a letter dated May 22, 1972 and further amended in a letter dated June 26, 1972. Copies of these letters are annexed respectively as Exhibits B and C hereto.

5. The contract as amended provided, among other things, that plaintiff would have the sole and exclusive right to obtain for defendant a loan or loans in the amount of approximately $19,000,000 to be used by defendant for the construction of an apartment hotel project in Puerto Rico. Under the contract as so amended, defendant promised to pay plaintiff a brokerage fee consisting of 1-1/2% of the principal amount of any loan commitment delivered to defendant pursuant to the contract or of any other loan commitment accepted by defendant in connection with the project referred to in the contract.

6. At all relevant times, plaintiff has rendered full performance under and has complied with all of the terms and conditions of the contract as amended. Pursuant to the contract and the amendments thereto, plaintiff made diligent efforts to obtain the loan commitment sought by defendant and in reliance upon its exclusive rights under the contract incurred substantial expenses in so doing. Its efforts included, among other things, the writing of letters transmitting information concerning the proposed project to Housing Investment Corporation ("HIC"), an institutional lender having offices in Puerto Rico, and to The Chase Manhattan Bank (N.A.), which upon information and belief is the parent company of HIC, and extensive negotiations with and the collection, preparation and submission of extensive materials concerning defendant's proposed project to another lending institution, First Mortgage Investors, which had shown substantial interest in making the loan but which eventually decided not to do so. Plaintiff was also willing and able to solicit and negotiate with other prospective lenders as soon as it learned of the negative decision of First Mortgage Investors.

7. On information and belief, while the contract as amended was in full force and effect and while plaintiff with

defendant's full knowledge and consent was engaged in serious negotiations with First Mortgage Investors on defendant's behalf and without the permission or knowledge of plaintiff, defendant retained a different broker and through this other broker negotiated with HIC for the financing of the project referred to in the contract, and while the contract as amended was still in full force and effect, defendant, through the other broker, accepted a commitment made by HIC to provide the financing for the project referred to in the contract in the amount of approximately $19,000,000 or more and therefore owes plaintiff a fee of 1-1/2% of the principal amount of such commitment, or $285,000 or more.

8. On information and belief, plaintiff's activities under the contract as amended helped defendant obtain financing from HIC.

9. Defendant has repudiated and breached the contract as amended by refusing to pay the fee provided for therein despite repeated demands by plaintiff that it do so.

10. By reason of defendant's breach of the contract, plaintiff has been damaged in the amount of 1-1/2% of the total principal amount of the loan commitment accepted by defendant from HIC, or in the amount of $285,000 or more.

WHEREFORE, plaintiff demands that judgment be entered against defendant in the amount of $285,000 or in such larger amount as the proof may show, together with interest and the costs and disbursements of this action, and that plaintiff have such other and further relief as this Court deems just and proper.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD

By _____
A Member of the Firm
Attorneys for Plaintiff,
140 Broadway,
New York, New York 10005
(212) 344-8000

APPLICATION FOR COMMITMENT

WEBER, JACKSON & CURTIS
Incorporated
National Mortgage Division
110 Broadway
New York, N.Y. 10005

JA 8

DATE: March 24, 1972

RE: Melia Apartotel
Isla Verde, Puerto Rico

Gentlemen:

We hereby appoint you our sole and exclusive agent to make application for a loan or loans on our behalf, to any lending institutions selected by you, on the property hereinafter designated. This authorization shall become effective upon acceptance by you and shall remain in effect for a period of 90 days from the date of your acceptance and receipt of all necessary supporting data, per submission checklist attached, and such period shall be automatically extended, unless terminated in writing.

1. PROPERTY DESCRIPTION: Approximately 627 Condominium Units

2. GROUND DIMENSIONS OR AREA: Approximately 19,600 Sq. Mtrs.

3. LOAN SECURITY: First Mortgage Note or Bond, secured by the subject property, the applicant corporation, ~~its principals and their wives~~ including personal property and equipment incorporated in the realty and necessary for the operation of the subject real estate. For construction mortgage loans, satisfactory Completion and Performance bonds will also be required of the General Contractor.

4. OTHER SECURITY: Assignment of all ~~construction loans and/or~~ sales contracts, as well as ~~down payments and~~ deposits and advances by purchasers or prospective purchasers, to be escrowed or used in accordance with Puerto Rican law. The loans will be further guaranteed by Mr. Jose Melia, Sr., Mr. Pedro Fullana, and Basic Equities and Development Corp.

5. FINANCING REQUESTED:

TYPE OF LOAN	AMOUNT	Interest-Fees-Partic.	TERM	Constant	Note
Standby & Construction Loan Combination	$18.0 Mill	5.5% over New York prime (minimum 10%) (maximum 12%) simple interest on monies drawn, without loan fees to the lender.	60 mos. total incl. 24 mos. constr. plus two 6-mo. extensions if required	1% yr. if loan continued beyond constr. period.	--

6. HOLDBACK & ACHIEVEMENT: NOT APPLICABLE.

There are to be no compensating balances required.

7. PRE-PAYMENT PROVISIONS: Allowed in full at any time without penalty.

Inmobiliaria Melia de Puerto Rico, Inc.

EXHIBIT A

BEST COPY AVAILABLE

Re: Melia Apartotel
Isla Verde, Puerto Rico

JA 9

8. REPRESENTATIONS BY APPLICANT:

a) Title to subject property will be marketable and insurable.

b) Plans, specifications, contracts, cost breakdowns, appraisals, survey, financial statements and any other pertinent data will be furnished by applicant upon request for your use or for the use of any lender.

c) All fees for appraisals, survey, title insurance, title examination, abstract, legal fees, recordation, tax stamps, acceptance, loan fees or costs will be paid by applicant, in addition to other normal closing costs.

d) Applicant will promptly execute any lender's application and furnish such data, appraisals, and GOOD FAITH DEPOSITS, as required by the lending institution.

e) We will permit you to erect a sign on the property site, at your expense, to indicate that you arranged mortgage financing, and will provide you with a 8" x 10" glossy photograph of the finished building.

f) Applicant warrants current control of the property either in fee ownership, or contract to purchase, or option to purchase, or a leasehold interest, etc., with sufficient time remaining within which to process this loan application to a firm commitment and closing by

g) Title policy to be supplied by borrower, and legal documents to be supplied and prepared by borrower's attorney subject to approval by lender's attorney, subject to full approval by lender.

9. DEPOSIT AND FEES:

a) We herewith deposit with you, in escrow, the sum of $50,000 as a GOOD FAITH DEPOSIT, to be deposited by you in the "Paine, Webber, Jackson & Curtis, Incorporated-Special Deposit Account." Said sum will be refunded without interest in the event that you do not deliver a loan commitment as herein described.* In the event you do deliver such commitment, this deposit will be credited against the commissions due you in accordance with our agreement. *and within the authorized time limi

b) We agree to pay you a total brokerage fee of 1.5 % of the amount of the ~~each~~ loan commitment delivered to us, which substantially conforms to the terms and conditions set forth hereinabove, and/or any loan commitment accepted by us. Upon delivery of any commitment as aforesaid, THE GOOD FAITH DEPOSIT may be credited by you towards your total fee and the balance of your total fee, if any, shall thereupon become due and payable, at the time of final approval.

10. We understand that any lending institution financing or offering to finance our loan request may be interested in financing other projects in which we are directly or indirectly involved. Therefore, we agree to pay you a fee as designated in paragraph 9(b), in the event that any such lending institution extends financing within thirty-six months of the date hereof, to us, or to any individual, company or corporation with which we or any of our associates, principals, affiliates, and/or subsidiaries have a direct or indirect association.

11. GOVERNING LAWS: The parties agree that the terms and conditions of this agreement shall be construed and governed by the laws of the State of New York, and acknowledge that they have read this Agreement before signing it, and have received an exact copy thereof.

Applicant Inmobiliaria Melia de Puerto Rico, Inc

By:

Title: Executive Vice-President

Dated: March 27, 1972

Address GPO Box 1805

San Juan, Puerto Rico

00936

Zip

Tel. No. (809) 725-5858

Accepted: Paine, Webber, Jackson & Curtis Incorporated

BY: Title VP - RE

Date: April 3, 1972

RE: Melia Apartotel
Isla Verde, Puerto Rico

SUBMISSION CHECKLIST
(X) = Items Still Required

O.K. 1. Plot plan showing site and surrounding streets or highways

O.K. 2. Typical apartment plan for each type of apartment showing net leasable area of each

O.K. 3. Typical floor plan (Key Plan) or rental plan if commercial

O.K. 4. Outline specifications

O.K. 5. Two street maps of city -
Mark one map with site, rent comparables and other points of interest, including downtown area

O.K. 6. Two aerial photos -
Mark one photo with street listings, designation of North, points of interest, major buildings, etc.

O.K. 7. Specific address of subject property

O.K. 8. Site description

O.K. 9. Area and neighborhood description

O.K. 10. Schedule of income from rents and all other sources including parking, recreation etc.

O.K. 11. Itemized expenses (including RE tax details)

O.K. 12. Rent & Sales comparables (three) -
Must include name of development, address, number of units age, distance to subject, apartment type, area of each apartment type, monthly rental, rental per square foot, amenitites and recreational facilities and comments of location, etc.

O.K. 13. Itemized cost of construction, including Architects and Engineers, on and off-site improvement costs, actual land costs, and actual cash equities in the job to date

O.K. 14. Rendering and elevations

O.K. 15. Architect's area calculations of building, core areas, public and recreational areas etc. showing all the components, from net leaseable area to gross building area

O.K. 16. Authorization (attached) with required refundable GOOD FAITH DEPOSIT

O.K. 17. List of sponsors and resumes of their previous real estate activity

O.K. 18. Financial statements of principals and/or guarantors

O.K. 19. Financial statements of applicant mortgagor corporation or entity

O.K. 20. MAI Appraisal or Feasibility Study

21.

22.

Inmobiliaria Melia de Puerto Rico, Inc.

PAINE
WEBBER
JACKSON
& CURTIS
INCORPORATED

Established 1879 Members New York Stock Exchange, Inc. and other Principal Exchanges
140 Broadway, New York, N.Y. 10005 (212) 437-2121

May 22, 1972

Mr. Martin Cohen
c/o International Stretch Products, Inc.
1133 Avenue of the Americas
New York, New York

Re: Melia Apartotel
Isla Verde, Puerto Rico

Dear Marty:

In the interest of saving time and possibly preserving the quotation we already have from First Mortgage Investors, we are prepared to continue processing our application through for Trustee approval on the basis of eliminating Basic Equities from the guarantors.

As you know, First Mortgage Investors Trust has offered to take the following proposal to their committee for Trustee approval:

a)	Loan Amount:	$19.0 million, but no less than $18.0 million, from which funding the existing land loans will be prepaid or assumed
b)	Interest Rate:	4 1/2% over prime, floating upward or downward
c)	Term of Loan:	60 months, including a construction period of 24 months, plus two 6 months extension options if necessary, at a standby fee of 1/2% per extension
d)	Amortization:	1% per annum, only if the loan is kept on beyond the maximum construction period of 36 months

.../...

EXHIBIT B

e) Lenders Fees: Will amount to a total of 4%, including the standby fees, (drawing fees, origination fees, legal fees, etc.) including any loan servicing fees or charges

f) Guarantors: The loan will be guaranteed by Jose Melia, Sr., and Mr. Pedro Fullana, with Basic Equities-Marles Equities released from any such guarantee.

It is understood that because of the Puerto Rico tax situation this loan will be originated and serviced for First Mortgage Investors by the Berens Mortgage Bankers, Inc. of San Juan, and that all the loan fees described above will be collected by Berens on behalf of the participants in this loan.

If these initial terms and conditions are acceptable to you and your partners, would you please acknowledge this fact in the space provided below and return to my attention as soon as possible so that we can schedule a meeting with the Trust shortly thereafter. This will serve to amend our authorization dated March 24, 1972 to the terms and conditions described above, and will further serve to extend that authorization for the time required to process formally through the FMI Trustee Committee approval, but no later than 30 days from the receipt of your acknowledgement.

Now that the time consuming presentation work and negotiation has been concluded, I look forward to a fast approval and closing so that you can start construction without further delay.

Sincerely

Leonard Wilkes

Leonard Wilkes

ACKNOWLEDGED & ACCEPTED

INMOBILIRIA MEJIA DE PUERTO RICO, INC.

BY: _____

DATE: _____

cc: Jack H. Berger
cc: Pedro Fullana

PAINE
WEBBER
JACKSON
& CURTIS
INCORPORATED

Established 1879 Members New York Stock Exchange, Inc. and other Principal Exchanges
140 Broadway, New York, N.Y. 10005 (212) 437-2121

June 26, 1972

Inmobiliaria Melia de Puerto Rico, Inc.
Pan American Building
Hato Rey, Puerto Rico

Re: Melia Apartotel
Isla Verde, Puerto Rico

Gentlemen:

In accordance with your instructions, we are proceeding with the formal application to First Mortgage Investors through the Berens Mortgage Bankers, Inc. of San Juan, on the following basis:

Loan Amount	:	$19.0 Million
Interest Rate	:	4½% over prime floating
Loan Term	:	24 months plus two six-month extensions.
Lenders Fees	:	4.0% total, including standby fees, origination fees, drawing fees, and lenders attorney fees. Any extension in term described above will be at the cost of ½% per each six-month extension.
Loan Guarantees	:	The loan will be guaranteed by a lien on the subject property, by the stock of applicant corporation, and by $1.5 million of irrevocable U.S. bank letter of credit, to run for the same term as the construction loan.

.../...

In the interest of expediency, we have returned to the various makers, the $50,000 Good Faith Deposit originally tendered to Paine, Webber under the terms of our Application for Commitment dated March 24, 1972. This is to be exchanged for a check in the amount of $50,000 drawn to the order of Berens Mortgage Bankers, Inc., representing the refundable Good Faith Deposit required by First Mortgage Investors with their formal Application for Commitment. Would you please indicate your authorization for us to return this escrowed amount to the respective parties in the space provided below.

This will further serve to revise your application for commitment dated March 24, 1972 and amended May 22, 1972 to the terms and conditions noted above, and extended for the time required for appropriate Trustee approval and delivery of the final commitment documents. In all other respects the terms and conditions of the authorizations dated March 24, 1972 and amended May 22, 1972 remain in full force and effect, and we draw your particular attention to Item 9(b) which recites the fact that our brokerage fee is deemed to be earned and becomes due and payable at the time of final approval of the loan commitment.

Now that we appear to have cleared the major hurdle that has held up processing of this application for almost a month, we are hopeful of going forward without any further delay.

Sincerely

Leonard Wilkes

Leonard Wilkes, Director
National Mortgage Department

LW/je

AGREED & ACCEPTED

INMOBILIARIA MELIA DE PUERTO RICO, INC.

BY: _____

DATE: July 5 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

ANSWER

Defendant, by its attorneys, Weiss Rosenthal Heller & Schwartzman, answers the complaint herein as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 1 of the complaint.

2. Denies each and every allegation contained in paragraph 3 of the complaint except admits that said paragraph sets forth what plaintiff claims to be the subject matter jurisdiction of this Court.

3. Denies each and every allegation contained in paragraphs 4 and 5 of the complaint except admits that it executed the documents, copies of which are annexed to the complaint as Exhibits A through C inclusive, and respectfully refers to said documents for their terms and legal effect.

4. Denies each and every allegation contained in paragraphs 6 through 10 inclusive of the complaint.

FOR AN AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

5. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant demands judgment dismissing the complaint together with such other and further relief as to the Court may seem just and proper including the costs and disbursements of this action.

Dated: New York, New York

July 30, 1973

Yours, etc.,

WEISS ROSENTHAL HELLER & SCHWARTZMAN

By _____
A Member of the Firm
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017
725-9200

TO: DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD.
Attorneys for Plaintiff
140 Broadway
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED, : 73 Civ. 2422 (CBM)

Plaintiff, :

-against- : NOTICE TO TAKE DEPOSITION

INMOBILIARIA MELIA DE PUERTO RICO, INC., :

Defendant. :

- -x

S I R S :

PLEASE TAKE NOTICE that the defendant will take the depositions of plaintiff Paine, Webber, Jackson & Curtis, Incorporated, by its Vice President, Leonard Wilkes, upon oral examination pursuant to the Federal Rules of Civil Procedure before a notary public of the State of New York or some other officer or person authorized to administer oaths at the offices of Weiss Rosenthal Heller & Schwartzman, 295 Madison Avenue, New York, New York on the 25 th day of September, 1973, at 10:00 A.M. and if said deposition is not completed on that date, it will continue from day to day until

completed. You are invited to attend and cross-examine.

Dated: New York, New York

July 30, 1973

Yours, etc.,

WEISS ROSENTHAL HELLER &
SCHWARTZMAN

By _____
A Member of the Firm
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017
725-9200

TO: DEWEY, BALLANTINE,
BUSHBY, PALMER & WOOD
Attorneys for Plaintiff
140 Broadway
New York, New York 10005

16D

USDC SDNY 9/1/74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

NOTICE TO PRODUCE
PURSUANT TO RULE 34

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
Attorneys for Plaintiff
140 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10005
TELEPHONE 212 [illegible]

COPY RECEIVED
THIS 27th DAY OF Sept 1973
[illegible]
By: Richard McCarthy
Attorney for Defendant

JA 19

The parties having stipulated to the production of various documents, and the Court having so ordered said stipulation, filed March 5, 1974, the within motion is dismissed as moot.

Dated: N.Y., N.Y.
9/6/74

So ORDERED
Constance Baker Motley
U.S.D.J.

S. DISTRICT COURT FILED SEP 11 1974 S.D. OF N.Y.

MICROFILMED
SEP 12 [illegible]

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILE NO.		
SERVED		
FILED		
DOCKETED		

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

NOTICE TO PRODUCE PURSUANT TO RULE 34

Plaintiff, Paine, Webber, Jackson & Curtis Incorporated requests Defendant Inmobiliaria Melia de Puerto Rico, Inc. to produce and permit Paine, Webber to inspect and copy each document listed herein in the possession or custody of Inmobiliaria, or subject to its control.

Definitions

1. Inmobiliaria means Inmobiliaria Melia de Puerto Rico, Inc., its affiliates, subsidiaries, officers, directors, employees, agents, representatives and attorneys.

2. Paine, Webber means Paine, Webber, Jackson & Curtis Incorporated, its affiliates, subsidiaries, officers, directors, employees, agents, representatives and attorneys.

3. Document is used in its customary broad sense, and includes, but is not limited to, originals and any copy of the following items, whether printed or recorded, or reproduced by any other mechanical process, or written or produced by hand: agreements; communications, including intra-company communications; correspondence; telegrams; memoranda; records; books; summaries or records of telephone communications; summaries or records of personal conversations or interviews; diaries; forecasts; statistical statements; accountants' work papers; graphs;

charts; accounts; analytical records; minutes or records of meetings or conferences; reports and/or summaries of interviews; reports and/or summaries of investigations; opinions or reports of consultants; appraisals; records, reports or summaries of negotiations; brochures; pamphlets; circulars; press releases; contracts; notes; drafts of any documents; photographs; drawings; and other documents or writings of whatever description. Different versions of the same document (e.g., copies of a printed document with different handwritten notations) are different documents.

4. Or means and/or.

5. Person means a natural person, corporation, partnership, association or other organization.

6. You and your refer to Inmobiliaria.

7. The Apartotel refers to an apartment hotel, apartotel or similar structure to be constructed by you in or near Isla Verde, Puerto Rico.

Documents Requested

1. All documents which reflect or refer or relate to the agreement entitled Application for Commitment, a copy of which is attached to the Complaint in this action as Exhibit A, and any actual or proposed amendments to the agreement or to any other understanding or agreement between you and Paine, Webber concerning the financing of the construction of the Apartotel.

2. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication, occurring from January 1, 1971 to date with Paine, Webber or any broker other than Paine, Webber in connection with any financing or proposed financing of the construction of the Apartotel.

3. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date concerning any loan made, or proposed to be made, by Housing Investment Corp., Inc. or The Chase Manhattan Bank, N.A. to you in connection with the construction of the Apartotel or the actual or proposed employment of any broker in connection with such loan.

4. Any other documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date between you and any other person concerning the financing of the construction of the Apartotel.

Plaintiff requests Defendant to respond to the foregoing by October 25, 1973.

The inspection and copying of the documents produced pursuant to this request will take place at the office of Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, New York, at 10:00 A.M. on October 26, 1973.

Dated: New York, New York
September 25, 1973

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway,
New York, New York 10005.
Tel. No. (212) 344-8000

By_____
Attorneys for Plaintiff

TO:
WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
295 Madison Avenue
New York, New York 10017
Attorneys for Defendant

73 Civ. 2922 (CBM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

NOTICE TO PRODUCE
PURSUANT TO RULE 34

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
Attorneys for Plaintiff
140 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10005
TELEPHONE 212 964-8000

COPY RECEIVED
THIS 20th DAY OF Sept 1973
Weil, Gotshal, Manges & Lowenstein
By: Michael A. Cardozo
Atty's for Defendant

The parties having stipulated to the production of various documents, and the Court having so Ordered said stipulation, filed March 5, 1974, the within motion is dismissed as moot.

Dated: N.Y., N.Y.
9/6/74

SO ORDERED

Constance Baker Motley
U.S.D.J.

S. DISTRICT COURT FILED SEP 11 1974 S.D. OF N.Y.

MICROFILM
SEP 12

JA 23

9/1/74

UNITED STATES DISTRICT COURT JA 24
SOUTHERN DISTRICT OF NEW YORK

FILE NO.		
SERVED		
FILED		
DOCKETED		

- -x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- -x

73 Civ. 2422 (CBM)

NOTICE OF DEPOSITION

S I R S:

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, the Plaintiff, Paine, Webber, Jackson & Curtis Incorporated will take the deposition upon oral examination of Defendant Inmobiliaria Melia de Puerto Rico, Inc., a Puerto Rican corporation with its principal offices in Hato Rey, Puerto Rico, by (in order): Jack H. Berger, Martin Cohen, Pedro Fullana, and such other directors, officers, agents and employees of Defendant as may have knowledge of the facts, at 10:00 A.M. on November 1, 1973 at the offices of Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, New York, before a notary public, or before some other officer authorized by law to administer oaths.

The examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated: New York, New York
September 25, 1973

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway,
New York, New York 10005.
Tel. No. (212) 344-8000

By_____
Attorneys for Plaintiff

TO: WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
295 Madison Avenue
New York, New York 10017
Attorneys for Defendant

6D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- X

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

IMMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- X

73 Civ. 2422 (CBM)

AFFIDAVIT PURSUANT TO RULE 9(f)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JUDSON A. PARSONS, JR., being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for plaintiff herein. I make this affidavit pursuant to Rule 9(f) of the General Rules of this Court in support of plaintiff's motion filed herein on December 19, 1973 for an order providing for sanctions because of defendant's failure to submit to discovery or, in the alternative, compelling defendant to proceed with discovery and for plaintiff's fees and expenses incurred by reason of defendant's conduct pursuant to Rule 37 of the Federal Rules of Civil Procedure.

2. On Wednesday, December 26, 1973, I called Mr. Horowitz, attorney for the defendant herein, in order to inquire whether it was possible to settle by agreement the issues raised by this motion. I specifically asked if Mr. Horowitz could

stipulate to a date upon which defendant's officers could be deposed and a date upon which defendant's documents would be produced. He said he would inquire into the matter with his clients. Today I had another telephone conversation with Mr. Horowitz in which he informed me that he is unable to communicate with his client or supply any such dates. Consequently, it appears that the issues raised by the motion cannot be resolved without the intervention of the Court.

Judson A. Parsons, Jr.

Sworn to before me this 28th day of December, 1973.

John P. Hannigan
Notary Public

JOHN P. HANN...
NOTARY PUBLIC, State of ...
No. 52-9760...
Qualified in Suffolk County
Cert. Filed in New York County
Commission Expires March 30, 1974

6A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of Judson A. Parsons, Jr., sworn to December 17, 1973 and the Exhibits thereto, and the annexed Memorandum of Law, and upon all prior papers and proceedings had herein, the undersigned will move this Court, before the Honorable Constance B. Motley, United States District Judge, in Room 705, United States Courthouse, Foley Square, New York, New York, on December 26, 1973, at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 37(d) of the Federal Rules of Civil Procedure;

(1) directing that the allegations of the Complaint in this action be taken to be established for purposes of the action, that Defendant be precluded from opposing the claims asserted in the Complaint, that the Answer filed by Defendant in this action be stricken, and that judgment be entered by default for Plaintiff;

(2) in the alternative, compelling Defendant to proceed with discovery pursuant to Rule 37(a);

(3) awarding Plaintiff reasonable expenses, including attorney's fees, incurred by reason of Defendant's conduct; and

(4) granting other and further relief as may be appropriate and just.

Dated: New York, New York
December 13, 1973

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm

Attorneys for Plaintiff
Paine, Webber, Jackson & Curtis
Incorporated
140 Broadway
New York, New York 10005
Tel. No. (212) 344-8000

TO: WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- x

73 Civ. 2422 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JUDSON A. PARSONS, JR., being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for Plaintiff in this action. I make this affidavit in support of Plaintiff's motion pursuant to Rule 37(d) for an order imposing sanctions upon defendant for the continuing failure of its officers to appear for the taking of the deposition of Defendant and, in the alternative, for an order compelling defendant to proceed with discovery.

2. On September 25, 1973, a Notice of Deposition of Defendant was served upon counsel for Defendant. That Notice of Deposition, a copy of which is annexed to this affidavit and made a part of it as Exhibit A, provided for the examination of Defendant by Martin Cohen, Jack H. Berger and Pedro Fullana, all of whom acted on behalf of Defendant in connection with the matters involved in this litigation, and by such other

officers, directors, agents or employees as may have knowledge of the facts involved in this action.

3. A Notice to Produce pursuant to Rule 34 of the Federal Rules of Civil Procedure was also served on counsel for Defendant on September 25, 1972. A copy of that Notice is annexed to this affidavit and made a part of it as Exhibit B.

4. On October 29, 1973, I spoke to Richard F. Horowitz, Esq., a member of the firm of Weiss Rosenthal Heller & Schwartzman, attorneys for Defendant. Mr. Horowitz and I agreed that the deposition of Plaintiff, which had been previously noticed by Defendant, would be taken on November 21, 1973; that the deposition of Defendant by Messrs. Cohen and Fullana would be taken on December 4, 1973; and that Defendant would produce the documents requested, "as soon as possible, hopefully prior to November 16." A copy of Mr. Horowitz's letter to me confirming that agreement is annexed to this affidavit and made a part of it as Exhibit C.

5. The deposition of Plaintiff was taken by Mr. Horowitz on November 21, 1973. At that time he stated that he had been unable to obtain the documents requested from his client, with the exception of several items which had been in the possession of Mr. Horowitz's firm since prior to the commencement of this action. Although Mr. Horowitz produced those items, most of which were copies of correspondence between Plaintiff and Defendant, he did not produce the other materials called for by Plaintiff's request.

6. On December 3, 1973, Mr. Horowitz, in response to an inquiry by an associate in my office, stated that he was still unable to comply with the request for production, and that, moreover, Messrs. Cohen and Berger would not attend the deposition scheduled for the following day. He stated that Mr. Cohen

would be otherwise engaged and that while he had not spoken to Mr. Berger, he believed that Mr. Berger would also be engaged.

7. During that conversation, Mr. Horowitz said that Mr. Cohen could not be examined until after January 25, 1973, due to other engagements of Mr. Cohen and Mr. Horowitz. He was advised that while I felt that a motion to compel discovery or to impose sanctions was justified, Plaintiff was willing to consider deferring such a motion if Mr. Berger and the documents requested were produced during the month of December.

8. On December 5, 1973, Mr. Horowitz agreed to attempt to reach Mr. Berger and to schedule his deposition at some time in December, 1973. Since December 5, my office has received no communication from Mr. Horowitz concerning either the examinations of Messrs. Cohen, Fullana or Berger or the production of documents. Obviously, the officers of Mr. Horowitz's client are unwilling to face up to the obligations imposed upon them by the Federal Rules of Civil Procedure.

9. Defendant has sought no protective order with respect to Plaintiff's Notice to Produce or Plaintiff's Notice of Deposition.

10. In such a situation, an order imposing sanctions upon Defendant and awarding expenses to Plaintiff is proper, and, indeed, is required, if proper respect for the orderly procedures set forth by the Federal Rules of Civil Procedure is to be maintained. Defendant has refused to comply with proper discovery notices, and apparently contends only that it would be inconvenient for it to do so. This is not the sort of excuse that should be countenanced, particularly when, as here, Defendant has taken no steps to interpose timely objections to the discovery notices.

11. In the alternative, an order directing that Defendant, by Messrs. Cohen, Fullana and Berger, appear on a date certain, and that the documents requested by plaintiff be produced on a date certain, is required. Plaintiff should not be required to prepare for a deposition at some future time, only to discover that the deponent does not plan to attend. An order is required to prevent such conduct, and to insure that discovery will proceed without further delay.

Judson A. Parsons, Jr.

Sworn to before me this
17th day of December, 1973.

John P. Hannigan
Notary Public

JOHN P. HANNIGAN
NOTARY PUBLIC, State of New Yo
No. 52-0700305
Qualified in Suffolk County
Cert. Filed in New York County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- -x

73 Civ. 2422 (CBM)

NOTICE OF DEPOSITION

S I R S:

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, the Plaintiff, Paine, Webber, Jackson & Curtis Incorporated will take the deposition upon oral examination of Defendant Inmobiliaria Melia de Puerto Rico, Inc., a Puerto Rican corporation with its principal offices in Hato Rey, Puerto Rico, by (in order): Jack H. Berger, Martin Cohen, Pedro Fullana, and such other directors, officers, agents and employees of Defendant as may have knowledge of the facts, at 10:00 A.M. on November 1, 1973 at the offices of Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, New York, before a notary public, or before some other officer authorized by law to administer oaths.

The examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated: New York, New York
September 25, 1973

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway,
New York, New York 10005.
Tel. No. (212) 344-8000

By /S/ Judson A. Parsons, Jr.
Attorneys for Plaintiff

D

EXHIBIT A

TO: WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
295 Madison Avenue
New York, New York 10017
Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED, Plaintiff,	73 Civ. 2422 (CBM)
-against-	NOTICE TO PRODUCE PURSUANT TO RULE 34
INMOBILIARIA MELIA DE PUERTO RICO, INC., Defendant.	

Plaintiff, Paine, Webber, Jackson & Curtis Incorporated requests Defendant Inmobiliaria Melia de Puerto Rico, Inc. to produce and permit Paine, Webber to inspect and copy each document listed herein in the possession or custody of Inmobiliaria, or subject to its control.

Definitions

1. Inmobiliaria means Inmobiliaria Melia de Puerto Rico, Inc., its affiliates, subsidiaries, officers, directors, employees, agents, representatives and attorneys.

2. Paine, Webber means Paine, Webber, Jackson & Curtis Incorporated, its affiliates, subsidiaries, officers, directors, employees, agents, representatives and attorneys.

3. Document is used in its customary broad sense, and includes, but is not limited to, originals and any copy of the following items, whether printed or recorded, or reproduced by any other mechanical process, or written or produced by hand: agreements; communications, including intra-company communications; correspondence; telegrams; memoranda; records; books; summaries or records of telephone communications; summaries or records of personal conversations or interviews; diaries; forecasts; statistical statements; accountants' work papers; graphs;

EXHIBIT B

charts; accounts; analytical records; minutes or records of meetings or conferences; reports and/or summaries of interviews; reports and/or summaries of investigations; opinions or reports of consultants; appraisals; records, reports or summaries of negotiations; brochures; pamphlets; circulars; press releases; contracts; notes; drafts of any documents; photographs; drawings; and other documents or writings of whatever description. Different versions of the same document (e.g., copies of a printed document with different handwritten notations) are different documents.

4. Or means and/or.

5. Person means a natural person, corporation, partnership, association or other organization.

6. You and your refer to Inmobiliaria.

7. The Apartotel refers to an apartment hotel, apartotel or similar structure to be constructed by you in or near Isla Verde, Puerto Rico.

Documents Requested

1. All documents which reflect or refer or relate to the agreement entitled Application for Commitment, a copy of which is attached to the Complaint in this action as Exhibit A, and any actual or proposed amendments to the agreement or to any other understanding or agreement between you and Paine, Webber concerning the financing of the construction of the Apartotel.

2. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication, occurring from January 1, 1971 to date with Paine, Webber or any broker other than Paine, Webber in connection with any financing or proposed financing of the construction of the Apartotel.

3. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date concerning any loan made, or proposed to be made, by Housing Investment Corp., Inc. or The Chase Manhattan Bank, N.A. to you in connection with the construction of the Apartotel or the actual or proposed employment of any broker in connection with such loan.

4. Any other documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date between you and any other person concerning the financing of the construction of the Apartotel.

Plaintiff requests Defendant to respond to the foregoing by October 25, 1973.

The inspection and copying of the documents produced pursuant to this request will take place at the office of Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, New York, at 10:00 A.M. on October 26, 1973.

Dated: New York, New York
September 25, 1973

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway,
New York, New York 10005.
Tel. No. (212) 344-8000

By /s/ Judson A. Parsons, Jr.
Attorneys for Plaintiff

TO:
WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
295 Madison Avenue
New York, New York 10017
Attorneys for Defendant

WEISS ROSENTHAL HELLER & SCHWARTZMAN
295 MADISON AVENUE, NEW YORK, N. Y. 10017

JULIUS WEISS
FRANK M. ROSENTHAL
JACOB W. HELLER
HERMAN SCHWARTZMAN
LEONARD I. ABINSTOCK
DAVID M. GAMELIA
ANDREW DALE
MARCEL SILVERSTOLPE
ELIHU ABRAMOWITZ
EDMUND M. COLLER
RICHARD F. HOROWITZ

HOWARD L. MANN
F. COOPER RAND
HOWARD S. JACOBS
MITCHELL B. MAST
EDWARD P. FINGERMAN
MICHAEL R. SONDERS
ELI FEIT
SIMON POSNER

(212) 725-9200
CABLE ADDRESS
WEISTHAL

HOWARD MILTON SPELLMAN
MATTHEW L. LIFFLANDER
COUNSEL

October 29, 1973

Judson A. Parsons, Jr., Esq.
Messrs. Dewey Ballantine Bushby
Palmer & Wood
140 Broadway
New York, New York 10005

Re: Paine Webber v. Inmobiliaria

Dear Mr. Parsons:

This will confirm our telephone conversation of October 29 in which we agreed to the following:

1. I will take the deposition of Mr. Wilkes on November 21 at 9:45 A.M. at my office.

2. You will take the depositions of Messrs. Cohen and Berger at your office on December 4 at 9:45 A.M. and 2:30 P.M. respectively.

3. I will get you the documents that you have requested as soon as possible, hopefully prior to November 16.

Thank you for your cooperation.

Very truly yours,

Richard F. Horowitz

cc: Martin Cohen

EXHIBIT C

6C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD F. HOROWITZ, being duly sworn, deposes and says:

I am a member of the firm of Weiss Rosenthal Heller & Schwartzman, attorneys for defendant and I make this affidavit in opposition to plaintiff's motion pursuant to Rule 37 of the Federal Rules of Civil Procedure.

Defendant has at no time questioned the fact that it must produce for depositions its officers, directors and managing agents with knowledge of the facts involved herein. Defendant has also never questioned the propriety of plaintiff's notice for production of documents.

The only question between the parties regards the dates of compliance with these discovery requests. Apparently, this motion was precipitated by a telephone conversation that I had with counsel for plaintiff in which I advised him that, due to the press of other business, neither Mr. Cohen nor Mr. Berger would be available for depositions during the month of December. I also told counsel that I would be away during most of the month of January. Specifically, I will be taking depositions in Los Angeles on January 8 through January 11 and in San Francisco on January 22 and January 23. From January 12 through January 21, my family and I will be spending a much-needed vacation on the West Coast. I will be returning to my office on Friday, January 25. For these reasons, I advised counsel that I could not reschedule the depositions for any dates prior to the end of January.

Defendant has no objection to the Court fixing dates for the depositions of its officers, directors and/or managing agents at the very end of January or at any time thereafter. We will also produce the remainder of the documents requested by plaintiff in late January or early February.

It is unfortunate that the Court had to be troubled with this scheduling problem. We certainly have not caused any substantial delay in the progress of this matter. The depositions in question can probably be completed in two days, if indeed they take that long.

WHEREFORE, it is respectfully requested that the within motion be denied, except to the extent indicated above.

Richard F. Horowitz
RICHARD F. HOROWITZ

Sworn to before me this
20th day of December, 1973.

Denise Utt
DENISE UTT
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-9410220
Qualified in New York County
Commission Expires March 30, 1974

ter docketing

Moved to

Mag. Jacobs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAINE, WILBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

NOTICE OF MOTION AND AFFIDAVIT

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
Attorneys FOR Plaintiff
140 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10005
TELEPHONE 212 344-8000

RECEIVED
1/18/74
10

Defendant

U.S. DISTRICT COURT
FILED
JAN 31 1974
S. D. OF N. Y.

The within motion is respectfully referred to Magistrate Jacobs for assignment to a Magistrate for hearing and report on whether the Court should impose sanctions and/or compel discovery in accordance with Plaintiff's application.

SO ORDERED

Dated: New York, New York
January 25, 1974.

Constance Baker Motley
U.S.D.J.

MICROFILM
JAN 31 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- x

73 Civ. 2422 (CBM)

STIPULATION

It is hereby stipulated and agreed by and between the undersigned counsel for the parties to this action that:

1. All future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision.

2. The pending motion of plaintiff to compel discovery or impose sanctions is resolved as follows:

a. The documents whose production was sought by plaintiff's pending request for production of documents shall be produced on or before February 26, 1974 at a place to be agreed upon by counsel;

b. The oral examinations pursuant to Federal Rule of Civil Procedure 30 of Messrs. Cohen and Berger will be taken at the offices of counsel for plaintiff on February 28, 1974 at 10:00 a.m., and on March 5, 1974 at 9:30 a.m., respectively; and

c. The oral examination pursuant to Federal Rule of Civil Procedure 30 of Mr. Fullana is deferred sine die.

Dated: New York, New York
February 22, 1974

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm

Attorneys for Plaintiff
140 Broadway
New York, New York 10005
Tel. No. (212) 344-8000

WEISS, ROSENTHAL, HELLER & SCHWARTZMAN

By Richard F. Howard
A Member of the Firm

Attorneys for Defendant
295 Madison Avenue
New York, New York 10017
Tel. No. (212) 725-9200

SO ORDERED:

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

(CBM)

73 Civ. 2422 ~~(CMB)~~

NOTICE OF MOTION

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S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of Richard F. Horowitz and Martin L. Cohen, both sworn to April 11, 1974, and upon all prior pleadings and proceedings herein, the undersigned will move this Court before Hon. Constance Baker Motley, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, on the 22nd day of April, 1974, at 10:00 A.M. or as soon thereafter as counsel can be heard for an order as follows:

1. Pursuant to 28 USC 1404(a), transferring this action to the United States District Court for the District of Puerto Rico on the ground that the convenience of the parties and witnesses would be best served by such a transfer and that such a transfer would be in the interests of justice;

2. Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, directing that the deposition of Pedro Fullana, noticed by plaintiff to take place in New York City, be held at the United States Courthouse in Puerto Rico;

3. Pursuant to Rules 13(f) and 15(a) of the Federal Rules of Civil Procedure, granting defendant leave to serve and file an amended answer in the form annexed hereto; and

4. Granting defendant such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
April 12, 1974

Yours, etc.,

WEISS ROSENTHAL HELLER &
SCHWARTZMAN

By Richard Hayward
A Member of the Firm
Attorneys for Defendant
295 Madison Avenue
New York, N. Y. 10017

TO: DEWEY BALLANTINE BUSHBY PALMER & WOOD, ESQS.
Attorneys for Plaintiff
140 Broadway
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PAINE, WEBBER, JACKSON & CURTIS INCORPORATED, : 73 Civ. 2422 (CMB)

Plaintiff, :

-against- : AFFIDAVIT

INMOBILIARIA MELIA DE PUERTO RICO, INC., :

Defendant. :

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD F. HOROWITZ, being duly sworn, deposes and says:

BACKGROUND

I am a member of the firm of Weiss Rosenthal Heller & Schwartzman, attorneys for defendant and I make this affidavit in support of defendant's motion to transfer this action to the United States District Court in the District of Puerto Rico, to direct that plaintiff's deposition of Pedro Fullana take place in Puerto Rico and to grant defendant leave to serve and file an amended complaint containing counterclaims.

This action was commenced on or about May 31, 1973. The complaint, a copy of which is annexed hereto as Exhibit 1, alleges that on or about April 3, 1972,

plaintiff and defendant entered into a contract, which was subsequently amended twice, pursuant to which plaintiff was engaged by defendant as a broker to obtain for defendant a loan in the approximate amount of $19,000,000, the funds to be used by defendant for the construction of an apartment-hotel project in Puerto Rico. Under the contract, defendant promised to pay plaintiff a fee consisting of one and one-half percent of the principal amount of the loan. A copy of the contract is annexed as Exhibit A to the complaint. The contract was amended by written instruments of May 22, 1972 and June 26, 1972, copies of which are annexed as Exhibits B and C to the complaint. (The contract as amended is hereinafter referred to as "the agreement".)

The complaint goes on to allege that plaintiff made efforts to obtain financing for defendant and that a lending institution called First Mortgage Investors ("FMI") showed substantial interest in making the loan but eventually decided not to do so. Plaintiff then succeeded in obtaining the financing from another institutional lender, Housing Investment Corporation ("HIC"). The complaint concludes with a demand for approximately $285,000 damages.

Prior to and after the service of the complaint, there were significant negotiations regarding a possible settlement of this matter. Unfortunately, these negotiations proved unsuccessful. During the course of the negotiations we interposed an answer, a copy of which is annexed hereto

as Exhibit 2. At the time of the service of the answer we were not fully apprised of all of the relevant facts, particularly those which, we submit, should motivate the Court to transfer this action to Puerto Rico. We were also unaware of the facts underlying defendant's counterclaim which, in this motion, we seek leave to interpose.

FACTS DEVELOPED DURING DISCOVERY.

We shall summarize below the facts relevant to this motion that have been developed in the course of discovery.

Defendant sought financing in the sum of about $19,000,000 for the purpose of constructing an apartment-hotel project in Puerto Rico. Through a casual contact, a relationship between plaintiff and defendant was established which ultimately resulted in the agreement sued upon by plaintiff.

In the early spring of 1972, plaintiff approached FMI, an institutional lender, inquiring as to whether it would like to make the loan. In the course of the next few weeks, plaintiff represented to defendant that the loan had been placed with FMI and that the funds would be advanced as soon as the necessary paper work and other formalities were completed. Unfortunately, through no fault of the defendant, FMI never made the loan. Plaintiff delayed for some six months in its dealings with FMI but the ultimate result was

no loan. Finally, in October 1972, after plaintiff's dismal lack of performance during the preceding six months, defendant sought and quickly obtained financing through an alternative source, HIC.

CONVENIENCE OF WITNESSES.

It is apparently plaintiff's contention that, by contacting HIC on a preliminary basis in the spring of 1972, plaintiff contributed in some significant respect to defendant's ability to obtain financing from HIC six months later, in the fall of 1972. I am advised that the president of HIC, one John D. Yates, is prepared to testify that he is aware of no approach by plaintiff to HIC in the spring of 1972 or at any other time. While there is always the possibility that some contact was made between plaintiff and HIC of which Mr. Yates is unaware, I am informed that Mr. Yates will testify that any such possible contact had no bearing on the decision by HIC to make the loan to the defendant. Mr. Yates is therefore a significant witness in behalf of the defendant. He resides in Puerto Rico and spends most of his time there.

In addition, the broker who assisted defendant in obtaining the loan from HIC, one Juan J. Otero, resides in Puerto Rico. We believe that the ease with which defendant was able to obtain the loan from HIC, as contrasted with the total lack of performance on the part of plaintiff, will

emerge from the testimony of Mr. Otero and Mr. Yates. Mr. Otero also resides in Puerto Rico.

Further, the principal of the defendant who had most of the dealings with plaintiff, at least in the initial stages of the underlying transactions, is one Pedro Fullana who also resides in Puerto Rico. The other principal of the defendant who might also be a witness in its behalf, Martin L. Cohen, resides in the metropolitan New York area but, due to his extensive interests in Puerto Rican real estate, spends considerable time in Puerto Rico on a regular basis.

Neither Mr. Yates nor Mr. Otero, both of whom are such significant witnesses for defendant, will voluntarily appear to testify in New York.

Thus, the convenience of defendant and its witnesses would be best served by a transfer of this matter to the Federal Court in Puerto Rico and defendant would be significantly inconvenienced if it were required to continue to litigate this matter in New York.

On the other hand, the representatives of plaintiff who might possibly be called as witnesses, Messrs. Wilkes and de Saint Phalle, are international financial people who, I am advised, spend a considerable portion of their time travelling, including to Latin America.

RELATIVE CALENDAR CONGESTION AND OTHER FACTORS.

One additional factor that militates in favor of the transfer that we seek is a comparison between the trial calendars in the United States District Courts for the Southern District of New York and for the District of Puerto Rico. This Court is of course well aware of the inevitable and unavoidable delays in obtaining a trial date in a civil case in this District. By contrast, I am advised that the caseload of the United States District Court for the District of Puerto Rico is considerably lighter and that a trial date can be obtained in Puerto Rico within 6-10 months from the completion of discovery.

Finally, the real property involved in this matter is located in Puerto Rico.

For all of the above reasons, we respectfully request that this action be transferred to the Federal Court in Puerto Rico. The convenience of the parties and witnesses and the interest of justice would be best served by such a transfer. In the event defendant's motion for a transfer is not granted, we request that the deposition of defendant's principal, Mr. Fullana, which plaintiff has noticed for New York City, take place at the United States Courthouse in Puerto Rico.

In the third branch of this motion, we request leave to file an amended answer in which defendant alleges two additional affirmative defenses and counterclaims against

plaintiff. A copy of the proposed amended answer is annexed hereto as Exhibit 3. The defenses and counterclaims were not interposed at the time of the filing of our original answer because, quite candidly, counsel were not aware of the facts underlying the counterclaim. It was only in the course of discovery that the facts recited above were developed. Only during discovery did it become apparent to counsel that defendant was damaged by plaintiff's failure to perform which resulted in an unnecessary six-month delay in obtaining financing. This is the crux of the defenses and counterclaims which defendant seeks to interpose at this time.

WHEREFORE, it is respectfully requested that the within motion be granted in all respects.

Richard F. Horowitz

RICHARD F. HOROWITZ

Sworn to before me this
11th day of April, 1974.

Denise Utt

DENISE UTT
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-9419228
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARTIN L. COHEN, being duly sworn, deposes and says:

I am the president of the defendant corporation and I make this affidavit in support of defendant's motion to transfer this action to the United States District Court for the District of Puerto Rico and for permission to serve an amended answer containing two additional affirmative defenses and counterclaims.

Counsel, in the affidavit that he is submitting herewith, will deal at length with both branches of this motion. The purpose of this affidavit is to bring certain significant facts to the attention of the Court.

I am advised that one of the crucial considera-

tions on the motion for a transfer is the physical location and convenience of witnesses. The defendant corporation has three principals: Mr. Pedro Fullana who resides in Puerto Rico, the Melia Hotel group of Madrid, Spain and myself. Mr. Fullano will be a significant witness because, at least at the outset, he had most of the dealings with plaintiff and also because of his familiarity with the construction site involved in this litigation. To the extent that I am involved as a witness, it makes little difference to me whether the case is tried in New York or Puerto Rico. I have substantial real estate interests in Puerto Rico and I spend considerable time there on a regular basis.

Most significant, however, is that two third-party witnesses, who will be crucial to our case, both reside in Puerto Rico. They are Mr. Juan J. Otero and Mr. John N. Yates of the Housing Investment Corporation ("HIC").

One of the plaintiff's contentions, that has been developed in the course of discovery, is that by contacting HIC in the spring of 1972, plaintiff contributed in some significant respect to our ability to obtain financing from HIC six months later, in the fall of 1972. I am advised that Mr. Yates is prepared to testify that he is aware of no contact between plaintiff and HIC or that if there was contact of which he is unaware, it was of no material significance.

Mr. Otero was the broker on the financing ultimately obtained by defendant through HIC. I am advised that he is prepared to testify that he did not become involved in this situation until plaintiff delayed so long that it was apparent plaintiff could not obtain the financing. With Mr. Otero's help, defendant then succeeded in obtaining the financing from HIC in an extremely short period of time, in sharp contrast to plaintiff's unreasonable delay and failure to perform.

Neither Mr. Yates nor Mr. Otero will voluntarily appear to testify in New York.

From plaintiff's point of view, I respectfully suggest that it should make very little difference whether the case is tried in New York or Puerto Rico. The representatives of plaintiff who were involved in the underlying transactions, Mr. Wilkes and Mr. de Saint Phalle, are both involved in international financing and both do an extremely large amount of travelling. They spend substantial periods of time in Latin America.

Counsel are also requesting that we be permitted to amend our answer to interpose two additional defenses and counterclaims against plaintiff. I appreciate that we have not acted in this regard as rapidly as we might have but I do not believe that plaintiff will be prejudiced in

any way by permitting us to interpose the defenses and counterclaims. The delay was caused by the fact that we did not communicate to our attorneys, until recently, the facts underlying the counterclaims.

WHEREFORE, it is respectfully requested that the within motion be granted in all respect.

MARTIN L. COHEN

Sworn to before me this
11th day of April, 1974.

RICHARD P. HOROWITZ
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-5462013
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATE. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

- against -

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN DE SAINT PHALLE, being duly sworn, deposes and says:

1. I am Vice-President of Paine, Webber, Jackson & Curtis Incorporated ("Paine, Webber") and Director of its Real Estate Finance Department. I make this affidavit in opposition to Defendant's motion to transfer this action to the United States District Court for the District of Puerto Rico.

2. Paine, Webber is a Delaware corporation with its principal place of business in New York. Its executive offices and headquarters of its Real Estate Finance Department are located within this district. Paine, Webber maintains no office in Puerto Rico.

3. I am familiar with many of the matters involved in this litigation, and participated, on behalf of Paine, Webber, in the transactions which gave rise to this litigation.

4. I am a resident of New York, and would be inconvenienced if the trial were to take place in Puerto Rico. I do not often travel to Latin America and have never traveled to Puerto Rico on behalf of Paine, Webber.

5. Mr. Leonard Wilkes is a Vice President of Paine, Webber's National Mortgage Department. He represented Paine, Webber in connection with the transaction which gave rise to this litigation, and it is certain that he will be called upon to testify.

6. Mr. Wilkes is also a resident of New York although he is presently working in Paine, Webber's Pompano Beach, Florida office. He regularly returns to New York and would prefer that the trial be held here, as such a trial would involve far less expense and inconvenience than would a trial in Puerto Rico.

7. To my knowledge, Mr. Wilkes has never traveled to Latin America on behalf of Paine, Webber, and has rarely traveled to Puerto Rico.

John de Saint Phalle
John de Saint Phalle

Signed and sworn to before me
this 22 day of April, 1974.

Stephen H. LaCount
Notary Public

STEPHEN H. LaCOUNT
NOTARY PUBLIC, State of New York
No. 31-[illegible]
Qualified in New York County
Cert. Filed in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JUDSON A. PARSONS, JR., being duly sworn, deposes and says:

1. I am a member of the bar of this court and of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for Plaintiff Paine, Webber, Jackson & Curtis Incorporated. I make this affidavit in opposition to the motion by Defendant Inmobiliaria Melia de Puerto Rico, Inc. for an order (1) transferring this action to the United States District Court for the District of Puerto Rico pursuant to 28 U.S.C. § 1404(a); (2) granting Defendant leave to serve and file an amended answer including counterclaims; and (3) directing that the deposition of Pedro Fullana be held at the United States Courthouse in Puerto Rico.

The Pleadings

2. The Complaint in this action alleges that Plaintiff and Defendant entered into a brokerage agreement, which agreement provided in substance that Plaintiff was to have the

sole and exclusive right to seek a mortgage loan for Defendant in the principal amount of approximately $18,000,000 to be used in the construction of an apartment hotel project in Puerto Rico.

3. The Complaint further alleges that Plaintiff contacted several potential lenders, including Housing Investment Corporation ("HIC"), in an attempt to provide such a loan; that Defendant, utilizing the service of another broker, entered into a loan agreement with HIC while Plaintiff's exclusive agency was still in effect; and that Defendant has refused to pay Plaintiff the 1-1/2% fee (approximately $285,000) provided by the agreement.

4. In July of 1973, Defendant answered, denying liability and alleging as an affirmative defense that the Complaint fails to state a claim upon which relief can be granted. Below we state the history of the controversy, which shows that this is a case which should be tried in this Court and which further shows that Defendant is guilty of such laches as not to be entitled to any of the relief sought in its motion.

The Parties

5. As shown in the annexed affidavit of John de Saint Phalle, the principal place of business of Plaintiff, a Delaware corporation, is New York City and Plaintiff has no offices in Puerto Rico. Plaintiff maintains an active mortgage brokerage business in New York City.

6. Defendant is a Puerto Rican corporation organized for the purpose of constructing a large condominium hotel building in San Juan, Puerto Rico (Cohen, pp. 8-14)*. Its affairs are and have been controlled by three people:

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* The Depositions of Defendant by Messrs. Cohen and Berger and of Plaintiff by Mr. Wilkes will be referred to as "Cohen" "Berger", and "Wilkes", respectively. Cited portions of those transcripts are annexed to this affidavit as Exhibit A.

(a) Martin L. Cohen, a resident of New York, who owns or controls, directly or indirectly, approximately 50% of defendant's stock, and/or is an active participant in various real estate interests in the United States, and is Chairman of the Board of International Stretch Products, Inc., which has its headquarters in New York City (Cohen, pp. 3-10).

(b) Jack Berger, a resident of New York, who during the period of the complaint was a member of the board of directors and the senior financial officer of the Melia organization, a Spanish organization which owns and operates a number of hotels in Spain and other countries. At all relevant times Berger's principal place of business was in New York City (Berger, pp. 3-9). The Melia organization owns approximately 3/8ths of the stock of the defendant.

(c) Petro Fullana, a resident of Puerto Rico, who engages in real estate operations there. He controls approximately 1/8th of defendant.

The Contractual Relationship Between the Parties

7. The first contact between Plaintiff and Defendant occurred in late 1971 or early 1972 when Berger entered a securities brokerage office maintained by Plaintiff on Park Avenue in New York City and discussed with Plaintiff a matter having nothing to do with Defendant or the present controversy (Berger, pp. 8-9). In the course of this discussion, he mentioned the desire of Defendant to obtain financing for a proposed condominium hotel to be built in Puerto Rico and was informed that plaintiff was in the mortgage brokerage business and that this business was conducted at its headquarters at 140 Broadway,

New York, New York. Thereafter, Berger and Fullana visited Plaintiff's brokerage mortgage office there and spoke to John de Saint Phalle, a Vice President of Plaintiff, who was and is in charge of the real estate finance department of Plaintiff (Berger, pp. 12-14). As a result of this and other discussions with de Saint Phalle and Leonard Wilkes, head of Plaintiff's national mortgage department, the brokerage contract, which is Exhibit A to the complaint herein and upon which this action is based, was signed by Defendant on March 27, 1972 and by Plaintiff on April 3, 1972 (Cohen, pp. 26-29; Compl., Exhibit A).

8. Most of the negotiations between Plaintiff and Defendant leading to this contract occurred in New York. However, Wilkes made one trip to Puerto Rico to talk to Fullana about it and later Fullana made a trip to New York to talk to Berger about it (Berger, pp. 13-14; Wilkes, p. 9).

9. Paragraph 11 of the contract states that it is to be construed and governed by the laws of the State of New York.

10. The contract was executed by Wilkes for Plaintiff and by Fullana for Defendant (Cohen, pp. 25-30; Compl. Exhibit A). Both executions were in New York. Thereafter the contract was amended on two occasions; one amendment consisted of a letter dated May 22, 1972 from Wilkes in New York on behalf of Plaintiff to Cohen care of International Stretch Products in New York, a copy of which was signed by Cohen and returned to Plaintiff in New York. A copy of this letter is Exhibit B to the complaint. The second amendment was by a letter dated June 26, 1972 from Wilkes in Plaintiff's New York office to Defendant's office in Puerto Rico, a copy of which was signed by Cohen and returned to Plaintiff's New York office. A copy of this letter is Exhibit C to the complaint.

11. During the period April through September 1972, Wilkes, operating in Plaintiff's New York office, was actively involved in attempting to obtain a loan from HIC and various other lenders, particularly from First Mortgage Investors. During this period he corresponded frequently with principals of the Defendant about progress of the loan application. Most of his correspondence was with Berger in New York, some of it was with Cohen in New York, and some of it was with Fullana in Puerto Rico. Wilkes informs us that he met with representatives of Defendant in Puerto Rico on only three occasions in connection with the transactions involved in this case and has not been to Puerto Rico in more than a year, and that contrary to the Defendant's affidavit, he has never travelled to Latin America on behalf of Paine Webber, which is his full-time employer.

12. In the early fall of 1972 and much to his surprise Wilkes was told by FMI that it would not go through with the loan. He immediately notified Berger in New York of this fact and arranged to have lunch with Berger in New York shortly thereafter. It was at this lunch that Plaintiff learned that Defendant was obtaining financing from HIC (Wilkes, pp. 78-82). This loan was made by HIC shortly thereafter (Cohen, p. 93). Although HIC is a Delaware corporation having its principal place of business and its operations in Puerto Rico, it is a subsidiary of either The Chase Manhattan Corporation or The Chase Manhattan Bank, National Association, both of which are headquartered in New York. Before the loan was made by HIC, its president, John Yates, came to New York for a meeting with Cohen and Berger concerning the loan (Cohen, pp. 87-92).

Events Which Have Occurred Since the Dispute Arose

13. Thereafter Plaintiff had a number of contacts with Defendant, in which it sought payment of the fee provided for in the contract. All of these conversations were with Berger or Cohen in New York. In October of 1968, my firm was retained to pursue the matter and on or about November 8, 1972, de Saint Phalle and I met with Berger and Irwin Rosenthal, Esq., a partner of Mr. Horowitz, to discuss the matter. No suggestion was made at this time that the situs of the controversy was anywhere other than New York.

14. During the fall of 1972 and through the early spring of 1973, there were further settlement discussions, all of which occurred in New York. Again no suggestion was made during this period that such discussions should be held in any other place. After the complaint was filed in May 1973, there were further settlement discussions again in New York, and again with no suggestion that the discussions should be held in any other place. During these discussions, I was informed by Mr. de Saint Phalle that he and Cohen had shaken hands on a settlement agreement and that he had been assured that the case was settled, although Cohen did say that the approval of another representative of defendant still had to be obtained. After several months marked by repeated statements to us in New York by Defendant and Defendant's counsel that Defendants were unable to communicate among themselves, Plaintiff was informed that Defendant would not go forward with the settlement.

15. Thereafter Plaintiff actively commenced discovery by serving on September 25, 1973 a notice of deposition of defendant by Cohen, Berger and Fullana to be held in my firm's office in New York City. Defendant was also called upon to produce documents prior to the deposition, pursuant to Rule 34.

16. Defendant had previously noticed the deposition of Wilkes at the office of defendant's attorneys in New York, and by agreement of the parties this deposition was held there on November 21, 1973. The parties also agreed that the depositions of Cohen and Berger would be held at our offices in New York on December 4, 1973, that Fullana's deposition would be taken thereafter, if necessary, and that Defendant's documents would be produced in New York prior to December 4, 1973.

17. Cohen and Berger refused to appear for their respective depositions and Defendant refused to produce documents at the agreed-upon time. As a result of this failure, Plaintiff moved on December 13, 1973 for an order pursuant to Rule 37 of the Federal Rules of Civil Procedure imposing sanctions upon Defendant or, in the alternative, directing Defendant to proceed with discovery. The fact that Defendant's refusals were not excusable neglect but instead constituted a deliberate failure to live up to the obligations imposed by the Federal Rules of Civil Procedure was shown by my affidavit submitted in support of that motion, a copy of which is annexed as Exhibit B.

18. That motion was referred by the Court to Magistrate Jacobs and subsequently, pursuant to the suggestion of Magistrate Schreiber, a Stipulation was entered into and signed by the Court requiring that Messrs. Cohen and Berger appear at our office respectively on February 28, 1974 and on March 6, 1974 and that the production of documents be made there on or before February 26, 1974.

19. No documents were produced on or before that date. A few documents were produced at the examinations of Messrs. Cohen and Berger, which were held in our office on February 28 and on March 5.

20. Although the deposition of Defendant by Mr. Cohen was scheduled to begin at 10:00 A.M., Mr. Cohen did not appear until nearly 10:45 and stated that he had another engagement that afternoon. For that reason, the examination was adjourned at 2:15 P.M.

21. Thereafter, my office requested that Defendant's attorney, Mr. Horowitz, confirm that all documents called for by the Rule 34 request in the possession of Defendant and certain of its affiliates and agents had been produced, and he responded that he was unable to do so, but would again attempt to find out what the status of the production was. To date, he has not provided any such confirmation, nor has he made any response to specific requests for documents which were made during the depositions which he either took under advisement or agreed to comply with.

Defendants' Motion to Transfer

22. Puerto Rico would be an inconvenient forum for Plaintiff. One of its principal witnesses, de Saint Phalle, resides in New York and would have to make a special trip to Puerto Rico to testify there. Wilkes, its other principal witness, is a resident of New York although he is presently working in Paine, Webber's Pompano Beach, Florida, office. He regularly returns to New York, and would prefer that the trial of this action be held here, as attendance at such a trial would cause him far less inconvenience and expense than would a trial in Puerto Rico. Contrary to Mr. Horowitz's suggestion, Messrs. Wilkes and de Saint Phalle do not regularly travel to Latin America, as the affidavit of Mr. de Saint Phalle submitted in opposition to this motion demonstrates. In addition, all of Plaintiff's files and records relating to this transaction are located in this District.

23. Since this case involves the construction of a New York contract and may involve questions concerning the custom of the trade in the mortgage brokerage business in New York, outside witnesses as to custom and trade practices would also probably have to come from New York. Moreover, if the Defendants are successful in adding counterclaims alleging negligence and failure of performance by plaintiff there would be further issues in the case involving plaintiff's conduct in New York, and it may be necessary for the Plaintiff to call other witnesses from Plaintiff's New York office.

24. Early in the negotiations, Plaintiff retained my firm to represent it in this matter and we have conducted negotiations and discovery in New York and Plaintiff has made a substantial investment of time in the case. If the case is transferred to Puerto Rico, new counsel will have to be retained and a substantial duplication of effort and expense would result to Plaintiff's prejudice.

25. With respect to Mr. Horowitz's suggestion that the court calendar in Puerto Rico is not as congested as the calendar in this Court, a telephone inquiry by my associate, Daniel Carr, Esq., to the office of the Clerk of the United States District Court for the District of Puerto Rico disclosed that there are presently 1800 civil cases pending there before only two active judges. While the Clerk's office was unable to provide an estimate of the normal elapsed time between the completion of discovery and the time of trial, it stated that that time could easily be more than a year.

26. Defendant claims that the transfer motion should be made to suit the convenience of two non-party witnesses. One of these witnesses is said to be Otero, a broker who worked for Plaintiff in obtaining the loan from HIC and received a fee of $170,000, part of which is to be paid at a future time for so doing (Cohen, p. 97). Mr. Horowitz's affidavit suggests that Mr. Otero's testimony will establish "the ease with which defendant was able to obtain the loan from HIC, as contracted with the total lack of performance on the part of the plaintiff (Horowitz Aff., pp. 4-5). Assuming that this testimony has some relevance in this action, Defendants have offered no reason why a deposition of Otero could not be used. Moreover, since Defendant is a good customer of and owes money to Otero there is no reason to suppose that it cannot prevail upon him to come to New York for the trial.

27. The other non-party witness referred to by Defendant

is Yates, president of HIC, who Mr. Horowitz says will not voluntarily come to New York. However, Mr. Carr reached Mr. Yates by telephone on Friday, April 19, 1974 at HIC's Miami office and Mr. Yates confirmed that he comes to New York from time to time to meet with officers of The Chase Manhattan Bank. He would thus not be substantially inconvenienced if the trial were to be held here. In addition, even if it is not possible to schedule Mr. Yates' proposed testimony to coincide with one of his trips to New York, it is possible that Defendant will be able to persuade Mr. Yates to come to New York by the time the trial is held.

Defendant's Motion to Add Counterclaims

28. Eight months after having answered the Complaint, Defendant moves to add counterclaims alleging that it was damaged in the amount of $1.5 million as a result of a delay of approximately five months in obtaining its loan. This delay was allegedly caused by the alleged negligence of Plaintiff and by an alleged failure of Plaintiff to perform under the brokerage contract. So far as we know no such claim was mentioned by any representatives of Defendant to any representative of Plaintiff until about March, 1974, approximately one and a half years after the controversy herein began and about ten months after the complaint was filed.

29. Mr. Horowitz states in his affidavit in support of the motion that the defenses and counterclaims were not interposed at the time the answer was filed (more than eight months ago) because "quite candidly, counsel were not aware of the facts underlying the counterclaim. It was only in the course of discovery that the facts recited above were developed. Only during discovery did it become apparent to counsel that defendant was damaged by plaintiff's failure to perform which resulted in an unnecessary six-month delay in obtaining financing."

30. The affidavit of Mr. Cohen submitted in support of this motion states, on the other hand, "the delay was caused

by the fact that we did not communicate to our attorneys, until recently, the facts underlying the counterclaims."

31. One would suppose that if these so-called "facts," which are not described in the motion papers, were true and that if Defendant had really beem damaged in the amount of $1,500,000, its principals would have passed this information to its attorneys at the outset of the controversy. The failure of Defendant's representatives to transmit this information raises grave doubt as to the validity of the contentions. It is interesting to note that Cohen has offered no excuse whatever for his delay in informing his counsel of the alleged "facts."

32. Plaintiff has already encountered substantial delays in the prosecution of this action. The assertion of dubious counterclaims involving extraneous factual issues and requiring further discovery would prejudice Plaintiff.

WHEREFORE, counsel for Plaintiff requests that Defendant's motion be denied in all respects.

Judson A. Parsons, Jr.

Sworn to before me this
22nd day of April, 1974

Notary Public

EXCERPTS FROM TRANSCRIPT

OF THE DEPOSITION OF

DEFENDANT BY MARTIN COHEN

EXHIBIT A

EXAMINATION BY

MR. CARR:

Q Mr. Cohen, would you state your address for the record.

A Business or home?

Q Your home address.

A 4 Sinclair Drive, Great Neck, New York.

Q Do you have a business address?

A Yes, I do.

Q Would you state that address.

A 1133 Avenue of the Americas.

Q Is that the offices of International Stretch Products?

A Yes, it is.

Q Are you currently employed?

A Yes, sir.

Q By whom?

A International Stretch Products, among other corporations that the family has.

Q Are you an officer of International Stretch Products?

A Yes, I am. I am chairman.

Q You are employed by that corporation?

A Yes. Chairman is an officer in this particular

case.

Q You mentioned other corporations that you are affiliated with. Would you give me the names of those corporations?

A Basic Equities and Development Corporation.

Q Are you an officer of that corporation?

A Yes. President.

Q Does that corporation have offices in the State of New York?

A No. Not to my knowledge. The offices are in Puerto Rico.

Q Is it a New York corporation?

A It's a Delaware corporation.

Q With its principal place of business in Puerto Rico?

A Its principal place of business and principal corporations, which Basic Equities is a holding corporation. The principal companies which it holds are Puerto Rican companies. It's office is in Puerto Rico.

Q Are you presently a director of any other corporations?

A Yes.

Q What are those corporations?

A Several real estate corporations, family controlled.

I couldn't even -- Marles.

Q Marles Equities?

A Yes. That's just one of them. Other companies here. Most of them are in Puerto Rico.

Q Would you say that most of your time is devoted to companies such as Marles and Basic Equities or to International Stretch?

A International Stretch.

Q What percentage of your time would you say that you devote to International Stretch?

MR. HOROWITZ: I object.

I don't want to be difficult, but what is the significance?

THE WITNESS: 95 percent to Stretch.

Q How long have you been affiliated with Basic Equities?

A Since its inception.

Q When was that?

A To my knowledge --

Q Just your best recollection.

A Ten years, approximately. I founded it.

Q You said that Basic Equities is a holding company?

A For the most part, yes, it is.

Q Is it an operating company at all?

A I can't say. Technically, I don't know. In a legal sense, I don't know.

MR. HOROWITZ: Tell him what you understand that it does. What does it do?

THE WITNESS: Basic Equities has several wholly owned subsidiaries, mostly Puerto Rican corporations which are engaged in the real estate business in Puerto Rico only. Basic Equities does no business in the United States.

Q So you have been engaged, through Basic Equities at least, in the real estate business for at least ten years; is that correct?

A Yes.

Q Do you recall when the first discussion of the possible construction of an "apartotel" occurred?

A I would say about four years ago, to the best of my knowledge.

Q Do you recall who initiated those discussions?

A They were initiated by Mr. Fullana, Mr. Melia and myself.

Q Which Mr. Melia is that?

A Francisco.

Q Is that "Paco"?

A Yes.

Q Do you recall who initiated these discussions?

MR. HOROWITZ: You mean which of those people?

MR. CARR: Yes.

Q Which of the three of you came to the other?

A They came to me, as I recall.

MR. HOROWITZ: Just for the clarity of the record, do you remember which of the "they" came to you? I think that's what he is getting at.

THE WITNESS: I think it was probably Fullana first and then very shortly thereafter Mr. Melia.

Q Have you had any other business dealings in the past with Mr. Fullana?

A A very small nature, yes.

Q Had you had any other dealings with Mr. Melia or the Melia organization?

A No, sir.

Q You say this was abo. four years ago?

A Yes.

Q Did you have any correspondence with Mr. Fullana at that time about the proposed apartotel?

A I doubt it. We practically did everything in

perso . I might have. I don't think so.

Q Were those discussions in Puerto Rico or in New York?

A Yes, Puerto Rico.

Q Did there come a time when Inmobiliaria Melia de Puerto Rico, Inc. was formed?

A It was formed before I joined them, to the best of my knowledge.

Q Do you know about when that was?

A About four years ago.

Q Do you know who the incorporators were?

A Well, the Melia family of Spain and Pedro Fullana.

Q That's a Puerto Rican corporation; is that correct?

A I believe his brother was involved at the time, Jaimie Fullana.

MR. HOROWITZ: Do you have another question pending that he didn't answer, whether it was a Puerto Rican company?

MR. CARR: Yes, I did.

MR. HOROWITZ: Is it a Puerto Rican company, do you know?

THE WITNESS: To the best of my knowledge, it is. I think it has to be.

Q So some time after the inception of the defendant corporation you became a stockholder; is that correct?

A Very shortly, yes, thereafter.

Q About how long after that?

A It could have been maybe a few months.

Q Did you become a director at the same time?

A Yes.

Q And an officer?

A Yes.

Q What office did you first hold?

A President.

Q Are you still the president?

A I think so, yes.

Q At that time who were the other stockholders when you first joined the defendant?

A To the best of my knowledge, the Melia family. It could have been the Melia family or it could have been Melia's -- I believe it was the Melia family, the father and son and the brother, Jamie Fullana and Pedro Fullana and in my case not just myself. I think it was myself and my brothers. It was Martin Cohen, Lester Cohen and Arthur Cohen, to the best of my knowledge.

Q Are all of those people still stockholders

in the defendant?

A Yes, sir.

Q What percentage of the stock did you and your two brothers hold?

A 50.

Q Did Basic Equities hold any of the stock or any other corporation controlled by them?

A I don't recall. I am not clear. I think it was done individually and then it might have been transferred to Basic Equities. I don't know who the stockholder at this moment is or became. It might be Basic Equities. It probably is.

MR. HOROWITZ: In other words, your testimony is that either --

THE WITNESS: It's either the Cohens or Basic Equities have 50 percent. The Cohens own all of Basic Equities.

Q Does the defendant corporation hold meetings of the board of directors from time to time?

A Yes.

Q Approximately how often are those meetings?

A Very often, but they are not formal.

Q Are any minutes kept?

A No.

Q Are any notes made of those meetings?

A No. From time to time there have been, I believe, formal meetings. But very infrequently.

Q No minutes are kept even of the formal meetings; is that correct?

A I don't really know. I don't recall.

Q Prior to this deposition, did you or your counsel receive a request for production of documents?

MR. HOROWITZ: I will volunteer that I did.

Q You have examined your files and the files of the defendant in responding to that request?

A Yes.

Q You have come across no minutes of board of directors' meetings relating to the subject matter of this litigation; is that correct, or that would be responsive to the notice to produce?

A Yes, that is correct.

When you refer to "board of directors", you mean a meeting of Basic Equities?

Q No. I mean of Inmobiliaria.

A You are referring to meetings of Inmobiliaria Melia.

I don't recall then if there were minutes

kept. There may be. Fullana may have minutes.

MR. HOROWITZ: If there were minutes, where would they be?

THE WITNESS: Fullana would have them.

MR. HOROWITZ: In Puerto Rico?

THE WITNESS: Of course. The meetings would all be in Puerto Rico. It's very rarely that we would ever have any meeting anywhere but Puerto Rico. If they would be other than Puerto Rico, they would be in Spain.

MR CARR: Could I ask you whether Mr. Fullana's files have been examined?

MR. HOROWITZ: I don't know personally. I am advised that Mr. Cohen just returned from Puerto Rico and that a request was made by him.

THE WITNESS: Examine his files.

MR. HOROWITZ: He didn't examine his files.

THE WITNESS: They could be examined if you want. We have access to them. We could send you whatever you ask for.

Q My understanding was that the only documents in Puerto Rico which were responsive to the request for production were these documents which were sent to me on

Monday by Mr. Horowitz.

MR. HOROWITZ: That's not correct, sir. In fact, I have been advised that there are documents that were sent to me, I believe, on Tuesday from Puerto Rico. Mr. Cohen just returned from Puerto Rico last night. They were unfortunately mailed to my office. I checked with my office before we came down here and they had not been received as yet. But I have left word with a responsible person at my office that he should call me here and arrange to bring them here as soon as they are received. Now, I make no guarantee about the United States mails.

THE WITNESS: You will have them the latest tomorrow.

I don't know if there is anything different that you are going to receive than what you already have. I just mailed you whatever they had.

MR. HOROWITZ: I am also reviewing briefly the notice to produce, and perhaps it's a failure of communication, but I did not understand from it that counsel wanted meetings of the board of directors. I have no problem producing it, if

we have them, but I was not really aware that you wanted them.

MR. CARR: I don't really ask for minutes or records of meetings or conferences in the definition of documents, and of course we request those minutes only insofar as they fall within one of the numbered items that we request.

MR. HOROWITZ: I didn't understand specifically that you wanted minutes of board of directors' meetings. We will, of course, endeavor to locate them presumably in Puerto Rico.

THE WITNESS: They would only be in Puerto Rico.

MR. CARR: Fine, thank you.

Q Going back for a moment to the time you joined Inmobiliaria, for what purpose was that corporation formed?

A Inmobiliaria?

Q Yes.

MR. HOROWITZ: His understanding or what the certificate said?

Q Your understanding of why it was formed.

A For the purpose of land, for the ultimate purpose of building an apartotel.

MR. HOROWITZ: I imagine the answer is the same. I just want to make it clear.

THE WITNESS: I don't recall.

Q This letter, in the first paragraph, indicates that Mr. Wilkes is enclosing an application for commitment.

A I see that.

Q Do you recall whether Mr. Berger showed you that application for a commitment at about this time?

A I don't recall.

Q Do you recall discussing the application for a commitment with Mr. Berger?

A Possibly, but I don't recall.

Q Do you recall discussing it with Mr. Fullana?

A I don't recall.

Q Do you recall discussing it with anyone?

A No.

Q I now will hand you Defendant's Exhibit E for identification, which appears to be an executed copy of the application for commitment.

(Document is handed.)

A Yes.

Q I will also hand you Defendant's Exhibit C, which is a letter from Mr. Berger to Mr. Wilkes.

(Document is handed.)

MR. HOROWITZ: Let me just note that there are copies of some checks physically attached to the application for commitment as part of Defendant's Exhibit E.

MR. CARR: Fine.

A All right, I see it.

Q Do you recall receiving a copy of Defendant's Exhibit C, the letter dated March 29th from Mr. Berger to Mr. Wilkes?

A Yes.

Q Prior to this letter, do you recall discussing the terms of the application for commitment with Mr. Berger?

A Yes. Just around the time of this application.

Q What was the substance of those discussions?

A I don't recall. I can refresh my memory from looking at it, but I don't recall from memory.

Q Did you talk to Mr. berger more than once?

A Probably, yes.

Q Did you talk to Mr. Fullana?

A Yes.

Q Would your conversation with Mr. Fullana be in person or by telephone?

A I don't recall.

Q Do you recall going to Puerto Rico about this time?

A Probably. I just don't recall.

Q Directing your attention to the first paragraph of the application for commitment --

MR. HOROWITZ: You mean the paragraph preceding the numbered paragraph 1?

Q Yes. The paragraph beginning, "We hereby appoint you..."

Do you recall discussing that paragraph with anyone?

A Yes.

Q Who did you discuss that with?

A Probably with Berger.

Q Do you recall the substance of those discussions?

A Well, we all supported giving them the exclusive for thirty days.

Q Do you recall discussing the portion of the paragraph in the next to last line beginning, "And such period shall be automatically extended unless terminated in writing"?

A I don't recall discussing that with them at all.

Q Moving down to numbered paragraph 4, do you recall discussing the subject matter of this paragraph with Mr. Berger or Mr. Fullana?

A Yes.

Q What was the substance of those discussions?

MR. HOROWITZ: At any time, sir?

MR. CARR: Prior to the execution, which was on March 27th, I believe.

A I don't recall what the discussions were. I know we probably discussed it. It's two years ago.

Q At this time, prior to the execution of this document, was there anything in the document which was objectionable to you or unacceptable?

MR. HOROWITZ: Why don't you take your time and look it over, if you like.

(Pause in the proceedings.)

A There was nothing that I can recall that I found the substance to be objectionable.

Q Is this document signed by Mr. Fullana; is that Mr. Fullana's signature?

A It sure looks like it.

Q Are you familiar with Mr. Fullana's signature?

A I have seen it before many times.

Q This appears to be Mr. Fullana's signature?

A Yes.

Q Did Mr. Fullana sign this document with your consent?

A Yes.

MR. HOROWITZ: For the record, we have admitted in the answer that it was executed by the defendant. I don't think there is any issue about that.

Q Do you know Mr. Leonard Wilkes?

A Yes.

Q When did you first meet Mr. Wilkes?

A After March 24, 1972, to the best of my knowledge.

Q So, to the best of your recollection, you had not met him at the time this --

A To the best of my recollection. I know it was in early '72 that I met him.

MR. HOROWITZ: Why not state the question again.

Q To the best of your recollection, you had not met Mr. Wilkes prior to the execution of this document?

A I think that is correct.

Q Had you met anyone else employed by Paine,

Webber at that time?

MR. HOROWITZ: You mean prior to that time?

A Related to this?

Q Yes.

A Relative to this?

Q Relative to this.

A Not to the best of my knowledge; no.

Q Had you ever met Mr. de Saint Phalle? When did you meet Mr. de Saint Phalle?

MR. HOROWITZ: It hasn't been established that he ever did.

THE WITNESS: I said "yes".

MR. HOROWITZ: I'm sorry.

A A good deal after I met Mr. Wilkes. A good period of time after I met Mr. Wilkes.

Q Going back for a moment to the application for commitment, would you look at the checks that are attached to that document.

There appear to be three copies of three checks.

MR. HOROWITZ: One copy of each of three checks.

Q The first of which appears to be a copy of

after that meeting, a week or two, you had your loan?

A Or we were advised that it was approved by them. I don't recall exactly when the final documents were signed, although I have them in front of me.

Q Do you recall when you were so advised?

A Within two weeks or so after my meeting with Mr. Yates.

Q But you are unable to place the date of that meeting?

A No.

Q How long before the execution of the final documents would you say that you got that advice?

A A very short period, within a couple of weeks.

Q So Plaintiff's Exhibit 1, which was executed, I believe, on October 31st, was prepared within two weeks after you got this advice?

A As I recall, I think so.

Q Could it have been longer?

MR. HOROWITZ: I suppose anything is possible.

A It could have been three or four weeks. I don't know. I recall it being a very short space of time.

Q You say that your contact with Yates was through a broker?

in my addition here? It appears that some $90,000 has been paid to Mr. Otero and that $80,000 remains to be paid for a total fee of $170,000.

A That is correct.

Q I believe I asked you whether there was any agreement executed between you and Mr. Otero other than any agreement which might be reflected in these documents, and I don't recall your response.

A I don't know if there was. I can't answer that today. I can check, but I don't know. I have to call Puerto Rico to find out. It may have been referred to in the --

MR. CARR: Mr. Horowitz, if there was such an agreement, can I assume that will be included in the documents that --

MR. HOROWITZ: I had thought so. But I am not sure.

MR. CARR: I believe it's called for by our request.

MR. HOROWITZ: I asked them for it in Puerto Rico. Whether they understood me or not, I have no guarantee. I will ask them again.

BY MR. CARR:

Q But you know of no such agreement?

EXCERPTS FROM TRANSCRIPT

OF THE DEPOSITION OF

DEFENDANT BY JACK BERGER

EXAMINATION BY MR. McCLINTOCK:

Q Mr. Berger, would you state your full name and address for the record, please?

A Yes. Jack H. Berger. My residence is at 945 Fifth Avenue, New York, New York, 10021.

Q By whom are you employed?

A I am self-employed right now.

Do you want the name of the company?

Q Yes.

A Multi National Financial Services, Limited.

Q How long have you been self-employed?

A Since January 1st of this year.

Q By whom were you employed prior to that time?

A By the Melia Organization of Spain.

Q How long had you been with Melia Organization?

A Approximately four years.

Q What positions did you hold in the Melia Organization?

A I was a member of the Board of Directors and I was their senior financial officer.

Q Do you continue with your relationship with the Melia Organization now?

A Yes.

Q What is that?

A On a financial consultancy basis.

Q Is this pursuant to a written contract?

A Yes, it is.

Q Do you have any other business affiliations at this time?

A No.

Q Has your activity for the Melia Organization been primarily in the real estate development area?

A In financing their hotels and condominiums around the world.

Q In connection with your activities with the Milia Organization have you had occasion to use mortgage brokers in the past?

A Very seldom. For the most part I went directly to the funding institutions.

Q But you have on occasion?

A Yes, Ihave on occasion.

Q In the United States?

A In the United States, yes.

Q In connection with your use of such brokers have you in fact paid fees to them--

A Yes, we have

Q -- for their services?

Have you entered into written agreements

with those brokers?

MR. HOROWITZ: You mean has he ever or has he always or has he generally or what?

Q Have you ever entered into written agreements --

MR. HOROWITZ: Other than in this situation?

MR. McCLINTOCK: Other than in this situation with Paine, Webber?

A You see, my role is to structure the financing and then all of the documentation normally goes directly from the -- in the few cases we have used brokers from the broker to the people in Spain. I usually get a copy but frankly once I have structured the deal I really don't, in effect follow through on the nitty-gritty. I am fairly sure in those cases where we did use brokers we had some written documentation.

Q Would you retain copies of those documents in the file?

A Yes, I would.

MR. McCLINTOCK: We would like to have those documents, Mr. Horowitz.

MR. HOROWITZ: For all occasions --

MR. McCLINTOCK: Going back for the last three or four years, during the period of the

witness's familiarization with the Milia Organization.

MR. HOROWITZ: Let me just for clarity of the record seek to ascertain how many separate occasions during that period you think that you have used a broker?

THE WITNESS: I would think certainly no more than on two or three occasions.

MR. HOROWITZ: All right, we will take that under advisement.

MR. McCLINTOCK: All right, fine.

BY MR. McCLINTOCK:

Q Are you familiar with the organization called the Apartotel Management Corporation?

A Yes, I am.

Q Can you tell me what that is, please?

A It is a real estate office that was set up in the States by the Milias to sell domesticly their condominiums.

Q When you say domesticly you mean in the United States?

A In the United States.

Q Are you affiliated with that organization?

A I was affiliated with that organization.

Q What position did you hold?

A I believe I was a director of that company.

Q Where was --

A I may have been a secretary or treasurer, I am not sure, but I know I was a director.

Q Where was that company's offices maintained?

A They were maintained in the offices which I have recently taken over at 30 East 42nd Street. They have since moved. They are now at 580 Fifth Avenue.

Q They have been in New York, I gather?

A Oh, yes, they have been in New York for the past two or three years.

Q Is the corporation a domestic corporation?

A I believe it is.

Q Do you know what state it is incorporated in?

A No, I don't.

MR. HOROWITZ: By domestic you meant to imply continental United States as opposed to some territory or commonwealth or foreign country?

MR. McCLINTOCK: Right.

Q I will reframe the question to ask you this: Can you tell me where it is incorporated?

A No, I don't. I don't know.

Q Can you tell me when the idea of an Apartotel in Puerto Rico was first discussed with anybody connected with the defendant?

A No, I cannot because I lived overseas outside the United States until roughly October or November of 1971, which is when I came to this country and I did not get involved with Mr. Cohen or any people related to this Puerto Rician thing until probably December or January--December of '71 or January of '72.

Q To your knowledge the idea had already been conceived prior to that time?

A Yes, I am pretty sure it was.

Q When you first became involved with it, whom did you speak to with regard to what the plan was at that time?

A Well, I think the way -- let's see, the humble beginnings of my involvement were as follows:

A friend of mine in Spain -- this may seem a little irregular, but this is the way it started. A friend of mine had a brokerage account with your branch on Park Avenue in the 50's, 57th or 56th Street and I went to see the manager of that brokerage office on a personal problem that he had with you people on a

security account. In the throes of talking to the manager he asked me what business I was in and I told him and he said, well, our people downtown might be very interested in doing something with you, why don't you contact them.

Now, I don't recall whether your people called me or whether I called them and I would say this is probably sometime in -- probably December of 1971 and that is the first time I sort of focused in on this Puerto Rician thing.

Q It was in connection with the approaches to Paine, Webber?

A I don't recall whether your people from downtown called me or whether I called them but what really triggered the whole thing was this conversation I had with the manager of your brokerage office on Park Avenue in the 50's, and then shortly thereafter I made contact with Mr. Cohen.

Q With Mr. Cohen?

A Yes.

Q Is it your testimony then that Paine, Webber put you in touch with Mr. Cohen?

A No, no. After I had -- after Paine, Webber and I had made contact with one another about the

feasibility of doing something together in Puerto Rico, since I knew that Mr. Cohen was the principal Melia partner in Puerto Rico, I did it on my agenda that I would call him and all this did was trigger or accelerate my contacting Mr. Cohen whom I had not known prior to my arrival in the United States.

Q I gather that the Apartotel project was not a discussion with Paine, Webber until after you made contact with Cohen, is that correct?

A I don't really recall. I don't really recall.

Q Were you active in attempts to obtain financing for the Apartotel project in Puerto Rico during that period of time?

A No, I was not.

Q Were you aware of efforts to obtain financing for this project?

A I knew that there was a project in hand for Puerto Rico. I had no concept at the time, you know, how far down the road it was nor what efforts had been made nor even who was masterminding the thing but I had just arrived here and, frankly, I was more concerned with just getting my feet wet in the U. S. market place. I was sent up here basically to be a liaison to the financial community on Wall Street and also try to get something

with an American concern. This thing in Puerto Rico was sort of peripheral. It wasn't top priority.

Q To your knowledge who was first approached in connection with efforts to seek financing for this project by the defendant organization?

MR. HOROWITZ: That assumes he has some knowledge.

Q Do you have any knowledge of any approaches made to Paine, Webber or to others with regard to attempts to obtain financing?

MR. HOROWITZ: Could we break that down a bit? I think it is a compound question that may produce a little confusion.

Are you interested, first, in ascertaining facts regarding attempts or approaches that were made before Paine, Webber was approached?

MR. McCLINTOCK: Let's take it that way first.

Q Were there any approaches, to your knowledge, made to others besides Paine, Webber to obtain financing?

A I have no knowledge what took place prior to my contacting Mr. Cohen, which was in, as I said, December or January.

Q When you contacted Mr. Cohen at that time do you know whether other brokers or other institutions

were also being spoken to with regard to this project?

A I have no knowledge of that.

Q To your knowledge the only one contempated at that time was Paine, Webber?

A I don't really know. You see, what I did was, I contacted Mr. Cohen and suggested that we get together and get to know one another. In the course of an introductory meeting I did mention the fact that I had had conversations with Paine, Webber and throughout to Mr. Cohen, I said, "You know, Paine, Webber is a possible vehicle that you or we might want to utilize" and that was basically the sum total of my conversation with Mr. Cohen and it was agreed that we would get together periodically, you know, touch base and discuss Melia and so forth and so on.

Q Did he later get in contact with you with regard to this project, Mr. Cohen, I mean?

A I think that somewheres down the road he did suggest that we contact the Paine, Webber people and see what could be done in connection with this financing, yes.

Q Do you have any recollection as to when you made that first approach to Paine, Webber with regard to the financing?

A You mean over and beyond the initial contact?

Q Yes, the initial contact, that's right.

A It must have been late January or late February.

MR. HOROWITZ: Of '72.

THE WITNESS: Of '72.

MR. McCLINTOCK: I would like to have this document marked as Plaintiff's Exhibit 20. It is a letter from Mr. Berger to Mr. William Smith of Paine, Webber dated January 27, 1972.

...(Letter dated January 27, 1972 from Mr. Berger to Mr. William Smith of Paine, Webber marked Plaintiff's Exhibit No. 20 for identification.)...

Q Mr. Berger, regarding Plaintiff's Exhibit 20 for identification, does this coinside with your recollection --

A Yes.

Q When you made the --

A I forgot about the fact that Mr. Fullana was here. It was either late January or early February that Mr. Cohen said, "Well, why didn't you explore possibilities with Paine, Webber. And I now remember that Mr. Fullana was up here sometime towards the latter half of January and I took advantage of his presence here to come

down with Mr. Fullana to this office.

Q Do you recall speaking with Mr. Smith and Mr. De Saint Phalle?

A I do.

Q Do you recall what the substance of those discussions were with Mr. Smith and Mr. DeSaint Phalle?

A Yes. I think the substance was whether Paine, Webber could in fact come up with the financing needs that Mr. Fullana outlined to them on ourPuerto Rician project. I, frankly, did not have an independent knowledge of the Puerto Rician project and Mr. Fullana who was down there and who in effect was masterminding it locally gave them a dovetailed explanation of what it was all about.

Q Mr. Berger, I show you a document that was previously marked as Defendant's Exhibit A for identification and I ask you if you are familiar with the materials that are referred to in the body of that letter?

A Let's put it this way.

I never seen the financial statement of Basic Equities. If I have seen it I haven't, frankly, gone through it. I may have physically have handled it. I really do recall but I never evaluated the material.

what transpired with the deposit to be made in connection with the FMI application?

Perhaps we can start at the beginning. Apparently this question came up for active discussion during late May or early June, based on those exhibits. Is that generally your recollection as to when it was?

A I think so. I am trying to recall. I think that Mr. Fullana objected to our having to put up a good faith deposit.

Q Objected to whom, do you recall?

A I think he voiced an objection to both Mr. Wilkes and myself.

Q Was this at a meeting with Mr. Wilkes and yourself?

A It may very well have been.

Q Would that meeting have taken place here in New York?

A It must have, yes, it must have been in New York.

Q Did that meeting occur on or about the dates of these documents that you just read?

A It probably did.

Q Do you recall what else was said at that meeting by Mr. Fullana?

A No, I do not.

Q Or by Mr. Wilkes?

A No, I do not.

Q Do you recall what Mr. Wilkes's reaction to Mr. Fullana's statement was?

A Well, I think his reaction was that Mr. Fullana was incorrect, that it was traditional to put up a good faith deposit and that is the way Paine, Webber worked.

Q Do you recall how Mr. Fullana responded to that?

A I don't recall what Mr. Fullana's response was.

Q Was there a resolution of the question at that meeting?

A I don't believe so.

Q Do you recall what happened after that meeting with regard to this question of the deposit?

MR. HOROWITZ: You mean other than the exchange of this correspondence and other materials that are reflected in Exhibits 4 through 6 inclusive?

MR. McCLINTOCK: Right.

A I believe that Mr. Fullana and I had had a lengthy

discussion probably in a cab or in my office about this.

Q Do you recall what the substance of that discussion was?

A Namely that he did not feel that one had to put up a deposit and he claimed that he had never done so and he is a mortgagor and he indicated he had a lot of expertise in this area and therefore he was surprised by Paine, Webber's request.

Q Were you surprised by Paine, Webber's request?

A No.

Q Has it been your experience that such good faith deposits are required in connection with applications?

MR. HOROWITZ: Required by whom, the broker or the lender?

MR. McCLINTOCK: Required by the lender.

A The Melias have never put up a good faith deposit with any lender but I do know that it is often done and therefore the fact that we had not done it in my mind did not mean that this was -- that this was an unreasonable request.

Q Has it been your experience that brokers require good faith deposits --

A No.

Q -- as a general matter?

A No.

Q Other than Paine, Webber has any other broker required a good faith deposit?

A None.

Q Were you in communication with Mr. Wilkes by telephone immediately before the sending of these letters that you just looked at?

A I probably was.

Q Do you recall how it was agreed that the fifty thousand dollars that had earlier been given to Paine, Webber would be sent back to the defendant with new checks to be issued and made payable to FMI's agent?

A No, I do not recall the rationale behind that, no.

Q Do you recall the sequence of events that led up to that?

A Well, I think it was -- I think that I was the one who convinced Mr. Fullana and possibly Mr. Cohen, though I don't really have lucid recollection of having talked to Mr. Cohen, that a good faith deposit was not an unusual request but that I did feel that the good faith deposit, if it were going to be put up, should be put up

with the funding institution and not with the broker, since we, the Melias, have never made any deposits to any brokers that we had dealt with.

Q Had you earlier objected to the idea of giving a good faith deposit to Paine, Webber?

MR. HOROWITZ: I think that his testimony was that Paine, Webber was to be a conduit for the deposit to pass through Paine, Webber to the lending institution, so to ask him whether he had objected to giving a good faith deposit to Paine, Webber without clarifying the question with his earlier testimony in mind I think is somewhat misleading.

MR. McCLINTOCK: I will withdraw the question.

A Basicly my feeling about brokers is that they should get paid and they should get funds in hand when they have accomplished what they set out to accomplish. They are not a commercial bank. I don't see why they should have free funds.

Q Going back for a moment now you indicated that you recall persuading Messrs. Fullana and Cohen to give a good faith deposit to a lending institution in connection with an application.

Do you recall how it came about that the checks that had previously been given to Paine, Webber were then sent back to the three principals of the defendant?

MR. HOROWITZ: Wait a minute. Just for the clarify of the record I do not believe that the actul physical checks were given back. I think it is rather clear that Paine, Webber issued its own check -- three checks, I should say -- to the three principals and photocopies of those checks are annexed to Plaintiff's Exhibit 4.

So as I gather the circumstances, three checks were originally given to Paine, Webber, they were apparently deposited, and then at the time of the June 7th letter three checks on the account of Paine, Webber were issued.

MR. McCLINTOCK: I think that is correct.

Q Do you recall how that came to be?

A Well, I don't recall specifically, but I suspect that what may have happened is that I may have called Mr. Wilkes and said, look, I think I have convinced the non-Melia principals to put up their prorata share of the good faith deposit but they will only do so if the funds are held by the future lending institution, rather than by Paine, Webber, and I think I explained to Mr. Wilkes

why I didn't think Paine,Webber had the right to hold those funds.

Q Did you have more than one discussion with Mr. Wilkes about this time regarding this?

A I don't recall.

Q Looking at Plaintiff's Exhibit 6 and also at Plaintiff's Exhibit 5 which apparently is your letter in response to Mr. Wilkes's letter, were these letters exchanged after your discussions with Mr. Wilkes with regard to getting the fifty thousand dollars from Paine, Webber?

A I don't recall.

MR. HOROWITZ: For the record, they are dated the same date as Plaintiff's Exhibit 4 and therefore it probably was.

THE WITNESS: I really don't recall.

Q Was anyone else involved in these discussions with Mr. Wilkes besides yourself?

A Mr. Fullana.

Q Where did these discussions take place? Were they on the telephone or were they in person?

A Which discussions are you referring to? The initial one in which Fullana objected?

Q That I believe you testified was a meeting.

A Yes, here I believe in this office -- in Paine, Webber's offices.

Q Your later discussion with Wilkes with regard to the fifty thousand that had been given to Paine, Webber --

A I think they were all on the telephone.

Q On the telephone?

A Yes.

Q And Mr. Fullana was also involved in those conversations?

A No, I don't believe he was. He used to come up here for very abbreviated trips and he was very apprehensive about catching the evening plane back to Puerto Rico and I strongly suspect that he was not present.

Q In your letter of June 7th to Mr. Wilkes you indicate --

MR. HOROWITZ: This is Plaintiff's Exhibit 5, I believe?

MR. McCLINTOCK: That is correct.

Q I will read the first sentence, "I am in receipt of your letter dated June 7th and have taken careful note of the contents."

What specifically in his letter to you of

EXCERPTS FROM TRANSCRIPT

OF THE DEPOSITION OF

PLAINTIFF BY LEONARD WILKES

with him to discuss the matter.

Q What did he say?

A He said that I could.

Q Did you arrange to get together with him?

A I did.

Q Did you get together with him?

A I did.

Q Where, sir?

A In Puerto Rico.

Q Where in Puerto Rico?

A In San Juan.

Q How soon after the telephone conversation about which you have testified, did you get together with Mr. Fullana in San Juan, Puerto Rico?

A It was shortly thereafter, I have no actual recollection of the actual date.

Q How long a period of time did you spend with Mr. Fullana when you got together with him in San Juan?

A I spent a morning with him. He drove me to the site of the proposed development, then he drove me to the airport. I left the same day.

Q Did you have any discussions with him about business while you were with him?

A Yes, I did.

card were received and marked Defendant's Exhibit O for identification, as of this date.)

Q Previously, you testified, sir, that you learned from HIC or Chase, that the defendant had been negotiating with them with respect to a loan. Was it HIC that you learned they were negotiating with, or was it the Chase, or was it both?

A It was neither, but let me put it into sequence.

Q Okay.

A I first learned of it from Jack Berger.

Q When did you learn of it from Jack Berger?

A At a luncheon meeting that I had with him on October 5th.

Q '72?

A '72.

Q Who else, if anyone, was present at that luncheon meeting with Berger?

A Berger and I, alone.

Q What city did this occur in?

A At Columbia University, New York.

Q What did you say to Mr. Berger, and what did he say to you?

A I had called Berger the day before and advised

him of our rejection by FMI. I suggested that we had another alternative, and that we had already started work on that, and that I would explain it to him in detail the next day at a luncheon, and he agreed to meet me on the 5th.

Q What happened on the 5th?

A On the 5th I showed him some documents from FMI, just to keep our credibility of the fact that FMI, up until almost the day that they rejected us, was expecting the marketing study, and I wanted to show him that we had the serious intent that we had all along, and I told him how sorry I was, but upon the rejection of FMI following up on some of the other leads that we had, among whom was the Chase Manhattan Bank, which had told us they were now interested in the deal, the market had changed, and they were interested.

When I mentioned Chase Manhattan Bank, Berger, for the first time, told me that he or his partners had been in communication with the Chase or HIC in Puerto Rico.

Q Who at Chase or HIC had told you that due to the change in the market, they were now interested?

A Peter Haeffner at Chase.

Q Chase where, sir?

A In New York.

Q When did he tell you this?

A It was either on October 3rd or October 4, 1972.

Q Did you tell him, in effect, that you'd have to speak to the potential borrower?

A I told him that I would speak to the potential borrower the next day.

Q Then get back to Haeffner?

A Well, no. I told Haeffner certainly that we were interested in him following it up, and I didn't have to speak to the borrower. We were still authorized to go to any and all borrowers.

Q And you did speak to him?

A I did. Incidentally, it wasn't me telling Haeffner, it was Mr. de Saint Phalle.

Q When Berger told you that somebody at Melia had spoken directly with Chase or HIC, did they tell you when they had first spoken to whomever they had spoken to?

A Not precisely, but if I recall his statement, it was that they had been negotiating or talking to HIC for some time.

Q Did they tell you for how long the some time

was?

A My impression was it went back a month or more. I don't remember him telling me that.

Q Did Berger tell you who at Chase or HIC they had been speaking with?

A Well, he did tell me, and it was HIC rather than Chase.

Q I see.

A I don't recall whether he gave me the name of a party -- he might have said Yates, although I can't really recall.

Q Did he tell you anything about the substance of the conversations between representatives of HIC and representatives of the defendant?

A Only that they had been negotiating directly, and that they were close to a deal.

Q Did he show you any correspondence between the defendant on the one hand and HIC on the other?

A He didn't show me any correspondence.

Q What did you say when he told you about this?

A I was a little surprised. I reminded him of the fact that we were under exclusive authorization all this time, and also of the fact that we had submitted to both HIC and Chase, and that in accordance with our

authorization, we would earn a fee regardless of how this deal closed.

Q What did he say, if anything, in response to that?

A He said that he couldn't talk for the legalities of it, but he was going to discuss it with his partners.

Q Did he subsequently advise you that he had discussed it with his partners?

A He subsequently sent me a letter that you have already shown me -- may I add to that?

Q Certainly, go ahead.

A At that same meeting we both professed that we didn't want any hard feelings or legal problems.

Jack was very, what shall I say, he was very cooperative, and he was very agreeable to the fact that there shouldn't be any hard feelings, and it was suggested, at that time, that possibly we could compromise in some way.

Q Do you know, sir, whether the proposed loan from HIC to the defendant was ever consummated?

A I have never seen the document, but the building is well under construction, so I assume it has been.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JUDSON A. PARSONS, JR., being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for Plaintiff in this action. I make this affidavit in support of Plaintiff's motion pursuant to Rule 37(d) for an order imposing sanctions upon defendant for the continuing failure of its officers to appear for the taking of the deposition of Defendant and, in the alternative, for an order compelling defendant to proceed with discovery.

2. On September 25, 1973, a Notice of Deposition of Defendant was served upon counsel for Defendant. That Notice of Deposition, a copy of which is annexed to this affidavit and made a part of it as Exhibit A, provided for the examination of Defendant by Martin Cohen, Jack H. Berger and Pedro Fullana, all of whom acted on behalf of Defendant in connection with the matters involved in this litigation, and by such other

officers, directors, agents or employees as may have knowledge of the facts involved in this action.

3. A Notice to Produce pursuant to Rule 34 of the Federal Rules of Civil Procedure was also served on counsel for Defendant on September 25, 1972. A copy of that Notice is annexed to this affidavit and made a part of it as Exhibit B.

4. On October 29, 1973, I spoke to Richard F. Horowitz, Esq., a member of the firm of Weiss Rosenthal Heller & Schwartzman, attorneys for Defendant. Mr. Horowitz and I agreed that the deposition of Plaintiff, which had been previously noticed by Defendant, would be taken on November 21, 1973; that the deposition of Defendant by Messrs. Cohen and Fullana would be taken on December 4, 1973; and that Defendant would produce the documents requested, "as soon as possible, hopefully prior to November 16." A copy of Mr. Horowitz's letter to me confirming that agreement is annexed to this affidavit and made a part of it as Exhibit C.

5. The deposition of Plaintiff was taken by Mr. Horowitz on November 21, 1973. At that time he stated that he had been unable to obtain the documents requested from his client, with the exception of several items which had been in the possession of Mr. Horowitz's firm since prior to the commencement of this action. Although Mr. Horowitz produced those items, most of which were copies of correspondence between Plaintiff and Defendant, he did not produce the other materials called for by Plaintiff's request.

6. On December 3, 1973, Mr. Horowitz, in response to an inquiry by an associate in my office, stated that he was still unable to comply with the request for production, and that, moreover, Messrs. Cohen and Berger would not attend the deposition scheduled for the following day. He stated that Mr. Cohen

would be otherwise engaged and that while he had not spoken to Mr. Berger, he believed that Mr. Berger would also be engaged.

7. During that conversation, Mr. Horowitz said that Mr. Cohen could not be examined until after January 25, 1973, due to other engagements of Mr. Cohen and Mr. Horowitz. He was advised that while I felt that a motion to compel discovery or to impose sanctions was justified, Plaintiff was willing to consider deferring such a motion if Mr. Berger and the documents requested were produced during the month of December.

8. On December 5, 1973, Mr. Horowitz agreed to attempt to reach Mr. Berger and to schedule his deposition at some time in December, 1973. Since December 5, my office has received no communication from Mr. Horowitz concerning either the examinations of Messrs. Cohen, Fullana or Berger or the production of documents. Obviously, the officers of Mr. Horowitz's client are unwilling to face up to the obligations imposed upon them by the Federal Rules of Civil Procedure.

9. Defendant has sought no protective order with respect to Plaintiff's Notice to Produce or Plaintiff's Notice of Deposition.

10. In such a situation, an order imposing sanctions upon Defendant and awarding expenses to Plaintiff is proper, and, indeed, is required, if proper respect for the orderly procedures set forth by the Federal Rules of Civil Procedure is to be maintained. Defendant has refused to comply with proper discovery notices, and apparently contends only that it would be inconvenient for it to do so. This is not the sort of excuse that should be countenanced, particularly when, as here, Defendant has taken no steps to interpose timely objections to the discovery notices.

11. In the alternative, an order directing that Defendant, by Messrs. Cohen, Fullana and Berger, appear on a date certain, and that the documents requested by plaintiff be produced on a date certain, is required. Plaintiff should not be required to prepare for a deposition at some future time, only to discover that the deponent does not plan to attend. An order is required to prevent such conduct, and to insure that discovery will proceed without further delay.

Judson A. Parsons, Jr.

Sworn to before me this
17th day of December, 1973.

John P. Hannigan
Notary Public

JOHN P. HANNIGAN
NOTARY PUBLIC, State of New York
No. 52-6760405
Qualified in Suffolk County
Cert. Filed in New York County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

Conformed Copy
U. S. District Court
Filed
NOV. 11, 1974
S. D. of N. Y.

73 Civ. 2422 (CBM)

ORDER

Plaintiff Paine, Webber, Jackson & Curtis Incorporated having moved this Court on December 13, 1973 for an order pursuant to Federal Rule of Civil Procedure 37 compelling discovery or imposing sanctions; and

Orders having been filed by this Court on March 5, 1974, and September 11, 1974, directing, inter alia, that the documents whose production was sought by plaintiff's Request for Production dated September 25, 1973 be produced on or before February 26, 1974; that further discovery matters in this action be referred to the undersigned; and that plaintiff's motion be dismissed as moot; and

Counsel for plaintiff having advised the Court by letter dated October 22, 1974, of defendant's continuing failure to produce documents called for by plaintiff's Request and required to be produced by this Court's previous order; and

This matter having come on for a hearing on November 6, 1974, and counsel for both parties having been heard, and it appearing that defendant has failed to comply with this Court's Order of March 5, 1974 insofar as that Order directed the production of documents and that counsel for defendant has made no objection to plaintiff's Request for Production and has informed

the Court of his inability to obtain the required documents from defendant; NOW IT IS

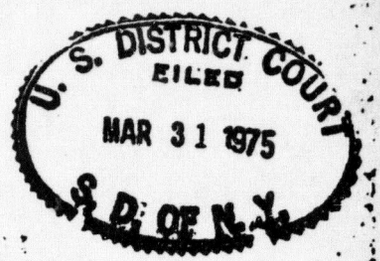
ORDERED that those documents called for by plaintiff's Request for Production dated September 25, 1973, including those documents specifically requested during the deposition of defendant held on February 28 and March 5, 1974, be produced on or before December 15, 1974; and it is further

ORDERED that, failing said production, it is the recommendation of the undersigned that defendant's answer be stricken and judgment be entered for plaintiff.

Dated: New York, New York
November 8, 1974

Ed Schreiber
United States Magistrate

Copy.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

PAINE, WEBBER, JACKSON & CURTIS, INC.,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- x

#42124

73 CIV. 2422

APPEARANCES

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
By: Judson A. Parsons, Jr.
Daniel L. Carr
140 Broadway
New York, New York 10005

Attorneys for Plaintiff

WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
By: Richard F. Horowitz
Eli Feit
295 Madison Avenue
New York, New York 10017

Attorneys for Defendant

CONSTANCE BAKER MOTLEY, D. J.

Memorandum Opinion and Order

This is an action to recover a brokerage commission allegedly owed plaintiff by defendant. The action arises out of an agreement between the parties which, in essence, provided that plaintiff was to solicit financing on behalf of defendant for the construction of an apartment hotel to be built in Puerto Rico. Upon obtaining such financing defendant was to pay plaintiff a brokerage fee amounting to a certain percentage of the principal.

By motion originally returnable April 22, 1974, defendant moved to transfer this action to the District of Puerto Rico pursuant to 28 U.S.C. § 1404(a), for leave to file an amended answer pursuant to Federal Rules of Civil Procedure 13(f) and 15(a), and for an order directing that the deposition of Pedro Fullana take place in Puerto Rico, rather than in New York as indicated in the notice, pursuant to Federal Rules of Civil Procedure 26(c).

Change of Venue

As is often the case in motions to transfer, it appears that one party will be inconvenienced by the selection

of either the original or proferred alternative forum. Here, defendant urges the court to transfer the action to Puerto Rico because certain significant witnesses, e.g. Otero, Yates, and Fullana, reside there. Defendant also notes that the court calendar in the District of Puerto Rico is apparently less congested than that of the Southern District of New York, and that the real property involved in this matter is located in Puerto Rico.

In opposing the motion to transfer, plaintiff notes that it is principally based in the Southern District of New York, that plaintiff's principal witnesses, e.g. Wilkes and de Saint Phalle, reside in this District, that negotiations with respect to the agreement largely occurred in this District, and that the agreement provides for the application of New York law.

In view of the above, the court concludes that there was "sufficient justification to support plaintiff's choice [of forum]." Saperstone v. Kapelow, 279 F.Supp. 781, 783 (S.D.N.Y. 1968). The court further finds that the relative inconvenience seems evenly balanced. The court notes that the plaintiff's choice of forum is entitled to great weight, and that absent a showing by defendant that the

balance of inconvenience tips heavily in its favor, plaintiff's choice will not be disturbed. National Iranian Oil Company v. Commercial Union Insurance Co. of New York, 363 F.Supp. 129, 135 (S.D.N.Y. 1973). In the court's view, defendant has failed to carry this burden. Indeed, much of the alleged hardship on defendant can be cured by taking the depositions of the witnesses who will not willingly come to New York. This is a particularly appropriate course in a bench trial. Saperstone v. Kapelow, 278 F.Supp. at 782-83. Accordingly the motion to transfer is denied.

Leave to File an Amended Answer

With respect to defendant's application for leave to file an amended answer, the court concludes that defendant has a substantial related counterclaim. Hence, inclusion and resolution of the previously omitted counterclaim would be in the interests of justice. Accordingly, notwithstanding the fact that the basis for the counterclaim could have been uncovered earlier through more diligent efforts by defense counsel, the court grants defendant's motion for leave to file its amended answer.

Location of the Deposition

Finally, defendant's request for an order designating that Fullana's deposition be taken in Puerto Rico rather than New York is denied. The location designation for taking depositions is addressed to the discretion of the court. There is no allegation that Fullana's absence from work will result in harm to defendant's business. Tomingas v. Douglas Aircraft Co., 45 F.R.D. 94 (S.D.N.Y. 1968). On the other hand, it would seem more economical that the one witness rather than the two lawyers incur travel expenses.

For the reasons noted above, defendant's motion to transfer and change the location of the deposition are denied. Defendant's application for leave to serve and file its amended answer is granted.

Dated: New York, New York
March 17, 1975

SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ.2422 (CBM)

AMENDED ANSWER

Defendant, by its attorneys, Weiss Rosenthal Heller & Schwartzman, answers the complaint herein as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 1 of the complaint.

2. Denies each and every allegation contained in paragraph 3 of the complaint except admits that said paragraph sets forth what plaintiff claims to be the subject matter jurisdiction of this Court.

3. Denies each and every allegation contained in paragraphs 4 and 5 of the complaint except admits that it executed the documents, copies of which are annexed to the complaint as Exhibits A through C inclusive, and respectfully refers to said documents for their terms and legal effect.

4. Denies each and every allegation contained in paragraphs 6 through 10 inclusive of the complaint.

FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

5. The complaint fails to state a claim upon which relief can be granted.

FOR A SECOND AFFIRMATIVE DEFENSE AND FOR A FIRST COUNTERCLAIM AGAINST PLAINTIFF, DEFENDANT ALLEGES:

6. Defendant is, and at all relevant times, was a corporation duly organized and existing under the laws of the Commonwealth of Puerto Rico, having its principal place of business in the Commonwealth of Puerto Rico.

7. Upon information and belief plaintiff is and at all relevant times was, a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business in the State of New York.

8. The jurisdiction of this Court is based upon the following:

A. There is diversity of citizenship between plaintiff and defendant and the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000. This Court therefore has jurisdiction pursuant to Section 28 USC 1332(a).

B. This Court also has jurisdiction over this counterclaim pursuant to Rule 13 of the Federal Rules of Civil Procedure.

9. On or about April 3, 1972, plaintiff and defendant entered into a contract in writing, a copy of which is annexed as Exhibit A to the complaint herein.

10. On or about May 22, 1972, plaintiff and defendant entered into an agreement in writing amending the original contract. A copy of the agreement of May 22, 1972 is annexed to the complaint as Exhibit B.

11. The agreements referred to in paragraphs 9 and 10 were further amended by an agreement in writing between plaintiff and defendant, dated June 26, 1972, a copy of which is annexed to the complaint as Exhibit C.

12. Soon after the execution of the contract referred to in paragraph 9 above, plaintiff represented to defendant that plaintiff had placed with First Mortgage Investors ("FMI") the loan in the approximate amount of $19,000,000 which defendant was seeking in connection with the construction of an apartment-hotel project in Puerto Rico.

13. Plaintiff continually dissuaded defendant from seeking alternative sources for such financing.

14. The contemplated loan transaction between defendant and FMI was not consummated.

15. In October 1972, defendant sought and obtained the necessary financing from an alternative source.

16. By reason of the foregoing, plaintiff failed to make substantial performance of its obligations under the agreements between the parties and committed a material breach thereof.

17. By reason of plaintiff's material breach of the agreements between the parties, defendant was delayed for a period of six months in obtaining the financing it sought and in commencing construction of the apartment-hotel project in Puerto Rico.

18. By reason of the foregoing, defendant has been damaged in the sum of $1,500,000.

FOR A THIRD AFFIRMATIVE DEFENSE AND FOR A SECOND COUNTERCLAIM AGAINST PLAINTIFF, DEFENDANT ALLEGES:

19. Repeats and realleges each and every allegation contained in paragraphs 6 through 18 inclusive of this answer with the same force and effect as though fully set forth herein at length.

20. Prior to the execution of the agreements referred to in paragraphs 9 through 11 above and thereafter, plaintiff represented to defendant that it was extremely qualified and expert in international financial matters such as the type of loan being sought by defendant.

21. Plaintiff failed to discharge its duty to defendant of acting competently, prudently and in a manner befitting an institution allegedly having the qualifications described in paragraph 20 above.

22. Plaintiff failed to discharge its duty to defendant of performing with reasonable care and prudence

WHEREFORE, defendant demands judgment against plaintiff as follows:

A. Dismissing the complaint herein;

B. On its counterclaims, awarding defendant the sum of $1,500,000; and

C. Granting defendant such other and further relief as to the Court may seem just and proper including the costs and disbursements of this action.

Dated: New York, New York
~~April 12, 1974~~
April 8, 1975

Yours, etc.,

WEISS ROSENTHAL HELLER & SCHWARTZMAN

By Richard F. Horowitz
A Member of the Firm
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017
(212)725-9200

TO: DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
Attorneys for Plaintiff
140 Broadway
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3286-37

PAINE, WEBBER, JACKSON & CURTIS, INC.,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 CIV. 2422

C.B.M.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Richard F. Horowitz, sworn to June 3, 1975, and upon all prior proceedings had herein, the undersigned will move this Court before Honorable Constance Baker Motley, United States District Judge, at the United States Court House, Foley Square, New York, New York on the 13th day of June, 1975, at 10:00 A.M. or as soon thereafter as counsel can be heard for an order pursuant to Rule 4(c) of the general rules of this Court permitting the firm of Weiss Rosenthal Heller & Schwartzman to withdraw as counsel of record for the defendant in the above entitled matter, and granting said firm such other and further relief as to the Court

may seem just and proper.

Dated: New York, New York
June 3, 1975

Yours, etc.

WEISS ROSENTHAL HELLER & SCHWARTZMAN

By: Richard F. Horowitz

RICHARD F. HOROWITZ
A Member Of The Firm
295 Madison Avenue
New York, New York 10017
Attorneys for Defendant
(212) 725-9200

To: Dewey, Ballantine, Bushby
Palmer & Wood
Attorneys for Plaintiff
140 Broadway
New York, N.Y. 10005

Inmobiliaria Melia De Puerto Rico, Inc.
c/o Martin L. Cohen
1133 Avenue Of The Americas
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS, INC.,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 CIV. 2422

AFFIDAVIT OF RICHARD F. HOROWITZ

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

RICHARD F. HOROWITZ, being duly sworn, deposes and says:

I am a member of the firm of Weiss Rosenthal Heller & Schwartzman, attorneys for defendant in the above entitled matter, and I make this affidavit in support of my firm's motion pursuant to Rule 4(c) of the general rules of this Court for an order permitting us to withdraw as counsel of record for defendant.

In this action, plaintiff seeks a brokerage commission based on its claim that it succeeded in obtaining financing for defendant and that, pursuant

to the written agreement between the parties, such a commission is due. Defendant counterclaimed for damages resulting from plaintiff's breach of the agreement and its negligence in performing services for plaintiff. This matter is not on the trial calendar. Although substantial pre-trial discovery has been conducted, significant additional discovery is required before the matter will be ready for trial.

The reason we seek permission to withdraw as counsel for defendant is that, due to circumstances beyond our control, we have been unable to obtain the necessary cooperation from the client that is required for us to do a professional and competent job of representing the defendant in this case. The situation has reached a point where we are unable to intelligently discuss with counsel for plaintiff a proposal that they have made with respect to settlement of this matter and we are unable to commit our client to deposition dates as requested by counsel for plaintiff.

In short, we are unable to give our client the representation that it deserves and we think the interests of the defendant and of the Court would be subserved by our withdrawing from the case and

other counsel being designed by defendant.

WHEREFORE, it is respectfully requested that the within motion be requested in all respect.

Richard F. Horowitz
RICHARD F. HOROWITZ

Sworn to before me this
3d day of June, 1975

Benjamin Geizhals
Notary Public

BENJAMIN GEIZHALS
Notary Public, State of New York
No. 03-4606357
Qualified in Bronx County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3286-37

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

NOTICE OF CROSS-MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Judson A. Parsons, Jr., sworn to June 11, 1975 and the Exhibits thereto, and the annexed Memorandum of Law, and upon all prior papers and proceedings had herein, the undersigned will cross-move this Court, before the Honorable Constance B. Motley, United States District Judge, in Room 705, United States Courthouse, Foley Square, New York, New York, on June 20, 1975, at 10:00 in the forenoon on that day or as soon thereafter as counsel can be heard, for an order pursuant to Rules 37(b)(2) and 37(d) of the Federal Rules of Civil Procedure;

(1) directing that the allegations of the Complaint in this action be taken to be established for purposes of the action, that Defendant be precluded from opposing the claims asserted in the Complaint, that the Amended Answer and Counterclaims included therein filed by Defendant in this action be stricken, and that judgment be entered by default for Plaintiff;

(2) awarding Plaintiff reasonable expenses, including attorneys' fees, incurred by reason of Defendant's conduct; and

(3) granting other and further relief as may be appropriate and just.

Dated: New York, New York
June 13, 1975

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm

Attorneys for Plaintiff Paine, Webber,
Jackson & Curtis Incorporated
140 Broadway
New York, New York 10005
Tel. No. (212) 344-8000

TO: WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED, Plaintiff, -against- INMOBILIARIA MELIA DE PUERTO RICO, INC., Defendant.	73 Civ. 2422 (CBM) AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS AND IN OPPOSITION TO DEFENDANT'S ATTORNEYS' MOTION FOR LEAVE TO WITHDRAW

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JUDSON A PARSONS, JR., being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for Plaintiff in this action. I make this affidavit in opposition to the motion of Defendant's attorneys for an order permitting them to withdraw as counsel of record and in support of Plaintiff's cross-motion pursuant to Rules 37(b)(2) and 37(d) for an order imposing sanctions upon Defendant for the continuing failure of one of its officers to appear for the taking of the deposition of Defendant and the failure of Defendant to comply with the orders of this Court concerning the production of documents.

2. Defendant's attorneys seek to withdraw as counsel of record from this action. Plaintiff opposes this motion on the ground that, as the facts set forth in paragraphs 25 through 28 below demonstrate, Defendant already has subjected Plaintiff to more than nineteen months of unjustifiable delay.

3. Plaintiff's cross-motion seeks sanctions and is supported by the facts set forth in paragraphs 4 through 24 below. These facts demonstrate Defendant's failure to comply with the provisions of Rules 30 and 34 and with this Court's order of March 5, 1974. Thus, Plaintiff is moving under Rules 37(b)(2) and 37(d) in order to obtain effective relief.

PLAINTIFF'S CROSS-MOTION

4. The facts set forth below demonstrate both the willfulness of Defendant's failure to adhere to the provisions of the Federal Rules of Civil Procedure and to obey the orders of this Court and the inadequacy of the remedy provided by Rule 37(a).

5. On December 18, 1973, motion papers for an order pursuant to Rule 37(d) of the Federal Rules of Civil Procedure: (1) imposing sanctions upon Defendant for the continuing failure of its officers to appear for the taking of the deposition of Defendant; or, in the alternative, (2) compelling Defendant to proceed with discovery, were served upon counsel for Defendant. My affidavit and exhibits annexed thereto, copies of which are annexed to this affidavit and made a part of it as Exhibit A, set forth Plaintiff's efforts to obtain discovery during the period from September 25, 1973 until service of the motion papers. Those efforts included, on September 25, 1973, a notice of deposition of Defendant by Martin Cohen, Jack H. Berger and Pedro Fullana, all of whom acted on behalf of Defendant in connection with the matters involved in this litigation; a notice to produce pursuant to Fed. R. Civ. P. 34, served on September 25, 1973; numerous communications, both oral and written, between either

myself or an associate in my office and Richard F. Horowitz, Esq., a member of the firm of Weiss Rosenthal Heller & Schwartzman, attorneys for Defendant; and a rescheduling of the depositions of Messrs. Cohen and Berger from November 1, 1973 to December 4, 1973. The failure of Messrs. Cohen and Berger to appear for the rescheduled deposition led to Plaintiff's previous motion.

6. In Mr. Horowtiz's affidavit in Opposition to Plaintiff's Motion, sworn to by him on December 20, 1973, he stated that "Defendant has no objection to the Court fixing dates for the depositions . . . at the very end of January or at any time thereafter. We will also produce the remainder of the documents requested by plaintiff in late January or early February." A copy of that affidavit is annexed to this affidavit and made a part of it as Exhibit B.

7. On December 26, 1973, I telephoned Mr. Horowitz and specifically asked if he could stipulate to dates for Defendant's deposition by its officers and for document production. He replied that he would inquire into the matter with his client. On December 28, 1973, I again spoke with Mr. Horowitz and was informed that he was unable to communicate with his client or supply any such dates.

8. Plaintiff's motion was referred by the Court to Magistrate Jacobs for assignment and subsequently was assigned to Magistrate Schreiber. Pursuant to Magistrate Schreiber's suggestion, on February 22, 1974 a stipulation was entered into by the parties, the terms of which became this Court's order dated February 26, 1974 and filed on March 5, 1974. The order required production of the documents sought by Plaintiff no later

than February 26, 1974; scheduled the depositions of Messrs. Cohen and Berger for February 28, 1974 and March 6, 1974, respectively; and deferred the deposition of Mr. Fullana until April 17, 1974. As a result of the stipulation and this Court's order, Plaintiff's motion subsequently was dismissed as moot.

9. On February 25, the Defendant produced a few documents; certain other documents were produced at the depositions of Messrs. Cohen and Berger. However, it became apparent during the course of the depositions that additional documents called for by Plaintiff's request had not yet been produced.

10. The deposition of Mr. Cohen was scheduled to begin at 10:00 A.M., yet Mr. Cohen did not appear until nearly 10:45 A.M. Because he stated that he had another appointment that afternoon, the examination was adjourned at 2:15 P.M.

11. On April 8, 1974, as a result of Defendant's failure to respond adequately and fully to Plaintiff's requests for documents, Daniel Carr, an associate in my office, wrote to Mr. Horowitz repeating Plaintiff's prior requests and advising him of our intention to depose Mr. Fullana on April 17, 1974 pursuant to this Court's order. Mr. Carr also requested Mr. Horowitz to confirm that certain files had been examined and that all documents in those files responsive to Plaintiff's request had been produced. A copy of this letter is annexed to this affidavit and made a part of it as Exhibit C.

12. On April 12, 1974, Defendant served Plaintiff with motion papers seeking, inter alia, an order directing that Mr. Fullana's deposition be held in Puerto Rico rather than in New York as noticed. Defendant's timing can only suggest that further delay of the examination of Mr. Fullana was sought. In Mr.

Horowitz's affidavit of December 20, 1973, referred to in paragraph 6 of this affidavit and annexed hereto as Exhibit B, Mr. Horowitz stated that Defendant did not question its obligation to produce its officers for depositions. At that time, no question was raised concerning the location of the deposition. On March 5, 1974, this Court ordered that Mr. Fullana's deposition be held on April 17, 1974. Yet nearly seven months after the notice of deposition had been served, Defendant moved to have the location changed.

13. While Defendant's motion, which did not seek a stay of document production, was pending, Mr. Carr made several telephone calls to Mr. Horowitz concerning documents that had not yet been produced. Finally, on June 26, 1974, Mr. Carr again wrote to Mr. Horowitz, noting that no response had been received to his letter of April 8, 1974. A copy of the June 26, 1974 letter is annexed to this affidavit and made a part of it as Exhibit D.

14. In a telephone conversation with Mr. Horowtiz on August 16, 1974, Mr. Carr again raised the question of the production of documents. Mr. Horowitz advised Mr. Carr that both he and his clients had been away and that he would attempt to have an answer by August 26, 1974.

15. In a letter to Mr. Carr, dated October 21, 1974, a copy of which is annexed to this affidavit and made a part of it as Exhibit E, Mr. Horowitz stated that "we have no further documents to produce," and that, specifically, Mr. Berger indicated that he had no further documents.

16. As a result of Defendant's continued failure to comply with Plaintiff's request for documents, we requested a conference before Magistrate Schreiber. That conference took place on November 6, 1974 and Magistrate Schreiber subsequently

issued his order, filed on November 11, 1974. A copy of the order is annexed to this affidavit and made a part of it as Exhibit F. Magistrate Schreiber found that the Defendant failed to comply with this Court's order of March 5, 1974 and ordered the production by Defendant, on or before December 15, 1974, of documents called for by Plaintiff's request for production dated September 25, 1974 and those requested during the depositions of Messrs. Cohen and Berger on February 28 and March 5, 1974. Failing said production, it was recommended that Defendant's answer be stricken and judgment be entered for Plaintiff.

17. On December 16, 1974, Mr. Horowitz sent to Mr. Carr certain travel and telephone records of Mr. Cohen for the years 1971 and 1972. He advised us that Mr. Berger had no documents to produce, although Mr. Berger had testified during his deposition that Melia files continued to exist and were in his possession. Mr. Horowitz concluded that Defendant thus had complied with all of Plaintiff's requests.

18. By mid-December 1974, Plaintiff had devoted more than one year to litigating the issue of document production by Defendant. Despite this Court's order, Defendant had produced fewer than twenty documents. Except for certain travel and telephone records of Mr. Cohen, a loan agreement with a lender and checks to a broker competing with Plaintiff at the time, all documents produced were correspondence between Plaintiff and Defendant. Defendant's apparent scarcity of documents seems highly unusual since Defendant is an international organization whose officers and directors reside and travel throughout the world.

19. Accordingly, on December 18, 1974 during a discovery conference, we cited these circumstances to Magistrate Schreiber, who then directed Mr. Horowitz to supply affidavits of Messrs. Cohen and Berger indicating that Plaintiff's requests had been complied with fully. Those affidavits have still not been supplied.

20. In an opinion filed March 31, 1975, this Court denied Defendant's motion for an order designating that the Fullana deposition be taken in Puerto Rico.

21. Having previously reached agreement with Mr. Horowitz that the Fullana deposition would take place on April 23, 1974, Mr. Carr tried to discuss the forthcoming deposition with Mr. Horowitz during the week of April 13, 1975. On April 18, 1975, Mr. Carr was able to speak briefly with Mr. Horowitz in that regard. Mr. Horowitz, however, said he would call back the following Monday. Attempts to reach Mr. Horowitz on Monday, April 21, 1975 were unsuccessful. On April 22, 1975, Mr. Carr again spoke to Mr. Horowitz in connection with the deposition and was informed that the deposition scheduled for the next day would not be taken.

22. On May 1, 1975, during a conference with Magistrate Schreiber, Mr. Horowitz stated that he would be seeking leave to withdraw from the case. On May 5, 1975, Mr. Horowitz reversed his decision to withdraw. He stated that he would attempt to have Mr. Fullana come to New York for his deposition, and Mr. Horowitz was provided with numerous dates that would be satisfactory to counsel for Plaintiff. During subsequent phone calls to Mr. Horowitz, my office was advised that Mr. Horowitz had been unable to contact Mr. Fullana, and the Fullana deposition

has not yet been rescheduled. More than nineteen months have passed since the original scheduled date for Mr. Fullana's deposition, and it has been seven weeks since the most recent scheduled date has passed.

23. Defendant's willful disregard of the Federal Rules of Civil Procedure, this Court's order of March 5, 1974, and Magistrate Schreiber's request for affidavits of Messrs. Cohen and Berger is evidenced by its counsel's motion to withdraw. In his description of his client's conduct, Mr. Horowitz makes it clear that Defendant's strategy is to thwart Plaintiff's efforts towards either settlement or litigation of the issues involved.

24. The accompanying memorandum of law (Point I) demonstrates that the proper and only adequate remedy left to Plaintiff at this time is application of the sanction provisions of Rules 37(b)(2) and 37(d). Accordingly, Plaintiff urges this Court to impose upon Defendant an order that: (a) the amended answer and counterclaims filed by Defendant in this action are stricken; (b) the allegations of the complaint in this action are taken to be established for purposes of this action; (c) the Defendant is precluded from opposing the claims asserted in the complaint; and (d) judgment is entered by default for Plaintiff.

OPPOSITION TO DEFENDANT'S COUNSEL'S MOTION

25. Plaintiff submits that only the sanctions provided in Rules 37(b)(2) and 37(d) are adequate and appropriate in light of Defendant's past conduct. Approval of Plaintiff's motion would render defense counsel's motion to withdraw moot. However, if Plaintiff's motion is denied, Plaintiff opposes defense counsel's motion to withdraw on the grounds that counsel's withdrawal would substantially prejudice Plaintiff and further delay proceedings in this action.

26. The events recited in paragraphs 5 through 22 demonstrate Defendant's pattern of delay and avoidance of the procedures set forth by the Federal Rules of Civil Procedure. Although it is not suggested that Defendant's counsel's motion is for the purpose of further delay, its effect will be just that.

27. In his affidavit, Mr. Horowitz states that "due to circumstances beyond our control, we have been unable to obtain the necessary cooperation from the client . . . ." There is no evidence that this failure is the fault of counsel, nor is there evidence that the situation would be any different if Defendant retained new counsel. The present state of this action is due to Defendant's willful failure to comply with the Federal Rules of Civil Procedure and this Court's order.

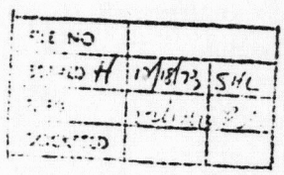
28. Defense counsel is familiar with the present posture of this action and with the pre-trial discovery that has occurred. The inherent delay involved in their withdrawal and Defendant's retention of new counsel would substantially prejudice Plaintiff. On the other hand, denial of the motion would cause no prejudice to Defendant or its attorneys if Defendant chooses to cooperate with its counsel and adhere to the Federal Rules of Civil Procedure and the terms of this Court's orders. Thus, it is respectfully requested that counsel's motion be denied.

Judson A. Parsons, Jr.

Sworn to before me this
11TH day of June, 1975.

Daniel Breen
Notary Public

DANIEL BREEN
NOTARY PUBLIC, State of New York
No. 03-[illegible]
Qualified in Bronx County
Cert. filed in New York County
Commission Expires March 30, 1976



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- x

73 Civ. 2422 (CBM)

NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of Judson A. Parsons, Jr., sworn to December 17, 1973 and the Exhibits thereto, and the annexed Memorandum of Law, and upon all prior papers and proceedings had herein, the undersigned will move this Court, before the Honorable Constance B. Motley, United States District Judge, in Room 705, United States Courthouse, Foley Square, New York, New York, on December 26, 1973, at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 37(d) of the Federal Rules of Civil Procedure;

(1) directing that the allegations of the Complaint in this action be taken to be established for purposes of the action, that Defendant be precluded from opposing the claims asserted in the Complaint, that the Answer filed by Defendant in this action be stricken, and that judgment be entered by default for Plaintiff;

(2) in the alternative, compelling Defendant to proceed with discovery pursuant to Rule 37(a);

(3) awarding Plaintiff reasonable expenses, including attorney's fees, incurred by reason of Defendant's conduct; and

(4) granting other and further relief as may be appropriate and just.

Dated: New York, New York
December 13, 1973

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm

Attorneys for Plaintiff
Paine, Webber, Jackson & Curtis
Incorporated
140 Broadway
New York, New York 10005
Tel. No. (212) 344-8000

TO: WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- x

73 Civ. 2422 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JUDSON A. PARSONS, JR., being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for Plaintiff in this action. I make this affidavit in support of Plaintiff's motion pursuant to Rule 37(d) for an order imposing sanctions upon defendant for the continuing failure of its officers to appear for the taking of the deposition of Defendant and, in the alternative, for an order compelling defendant to proceed with discovery.

2. On September 25, 1973, a Notice of Deposition of Defendant was served upon counsel for Defendant. That Notice of Deposition, a copy of which is annexed to this affidavit and made a part of it as Exhibit A, provided for the examination of Defendant by Martin Cohen, Jack H. Berger and Pedro Fullana, all of whom acted on behalf of Defendant in connection with the matters involved in this litigation, and by such other

officers, directors, agents or employees as may have knowledge of the facts involved in this action.

3. A Notice to Produce pursuant to Rule 34 of the Federal Rules of Civil Procedure was also served on counsel for Defendant on September 25, 1972. A copy of that Notice is annexed to this affidavit and made a part of it as Exhibit B.

4. On October 29, 1973, I spoke to Richard F. Horowitz, Esq., a member of the firm of Weiss Rosenthal Heller & Schwartzman, attorneys for Defendant. Mr. Horowitz and I agreed that the deposition of Plaintiff, which had been previously noticed by Defendant, would be taken on November 21, 1973; that the deposition of Defendant by Messrs. Cohen and Fullana would be taken on December 4, 1973; and that Defendant would produce the documents requested, "as soon as possible, hopefully prior to November 16." A copy of Mr. Horowitz's letter to me confirming that agreement is annexed to this affidavit and made a part of it as Exhibit C.

5. The deposition of Plaintiff was taken by Mr. Horowitz on November 21, 1973. At that time he stated that he had been unable to obtain the documents requested from his client, with the exception of several items which had been in the possession of Mr. Horowitz's firm since prior to the commencement of this action. Although Mr. Horowitz produced those items, most of which were copies of correspondence between Plaintiff and Defendant, he did not produce the other materials called for by Plaintiff's request.

6. On December 3, 1973, Mr. Horowitz, in response to an inquiry by an associate in my office, stated that he was still unable to comply with the request for production, and that, moreover, Messrs. Cohen and Berger would not attend the deposition scheduled for the following day. He stated that Mr. Cohen

would be otherwise engaged and that while he had not spoken to Mr. Berger, he believed that Mr. Berger would also be engaged.

7. During that conversation, Mr. Horowitz said that Mr. Cohen could not be examined until after January 25, 1973, due to other engagements of Mr. Cohen and Mr. Horowitz. He was advised that while I felt that a motion to compel discovery or to impose sanctions was justified, Plaintiff was willing to consider deferring such a motion if Mr. Berger and the documents requested were produced during the month of December.

8. On December 5, 1973, Mr. Horowitz agreed to attempt to reach Mr. Berger and to schedule his deposition at some time in December, 1973. Since December 5, my office has received no communication from Mr. Horowitz concerning either the examinations of Messrs. Cohen, Fullana or Berger or the production of documents. Obviously, the officers of Mr. Horowitz's client are unwilling to face up to the obligations imposed upon them by the Federal Rules of Civil Procedure.

9. Defendant has sought no protective order with respect to Plaintiff's Notice to Produce or Plaintiff's Notice of Deposition.

10. In such a situation, an order imposing sanctions upon Defendant and awarding expenses to Plaintiff is proper, and, indeed, is required, if proper respect for the orderly procedures set forth by the Federal Rules of Civil Procedure is to be maintained. Defendant has refused to comply with proper discovery notices, and apparently contends only that it would be inconvenient for it to do so. This is not the sort of excuse that should be countenanced, particularly when, as here, Defendant has taken no steps to interpose timely objections to the discovery notices.

11. In the alternative, an order directing that Defendant, by Messrs. Cohen, Fullana and Berger, appear on a date certain, and that the documents requested by plaintiff be produced on a date certain, is required. Plaintiff should not be required to prepare for a deposition at some future time, only to discover that the deponent does not plan to attend. An order is required to prevent such conduct, and to insure that discovery will proceed without further delay.

Judson A. Parsons, Jr.

Sworn to before me this
17th day of December, 1973.

John P. Hannigan
Notary Public

JOHN P. HANNIGAN
NOTARY PUBLIC, State of New Y-
No. 52-6700405
Qualified in Suffolk County
Cert. Filed in New York County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - -x

73 Civ. 2422 (CBM)

NOTICE OF DEPOSITION

S I R S:

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, the Plaintiff, Paine, Webber, Jackson & Curtis Incorporated will take the deposition upon oral examination of Defendant Inmobiliaria Melia de Puerto Rico, Inc., a Puerto Rican corporation with its principal offices in Hato Rey, Puerto Rico, by (in order): Jack H. Berger, Martin Cohen, Pedro Fullana, and such other directors, officers, agents and employees of Defendant as may have knowledge of the facts, at 10:00 A.M. on November 1, 1973 at the offices of Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, New York, before a notary public, or before some other officer authorized by law to administer oaths.

The examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated: New York, New York
September 25, 1973

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway,
New York, New York 10005.
Tel. No. (212) 344-8000

By /s/ Judson A. Parsons, Jr.
Attorneys for Plaintiff

D

EXHIBIT A

TO: WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
295 Madison Avenue
New York, New York 10017
Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

NOTICE TO PRODUCE PURSUANT TO RULE 34

- x

Plaintiff, Paine, Webber, Jackson & Curtis Incorporated requests Defendant Inmobiliaria Melia de Puerto Rico, Inc. to produce and permit Paine, Webber to inspect and copy each document listed herein in the possession or custody of Inmobiliaria, or subject to its control.

Definitions

1. Inmobiliaria means Inmobiliaria Melia de Puerto Rico, Inc., its affiliates, subsidiaries, officers, directors, employees, agents, representatives and attorneys.

2. Paine, Webber means Paine, Webber, Jackson & Curtis Incorporated, its affiliates, subsidiaries, officers, directors, employees, agents, representatives and attorneys.

3. Document is used in its customary broad sense, and includes, but is not limited to, originals and any copy of the following items, whether printed or recorded, or reproduced by any other mechanical process, or written or produced by hand: agreements; communications, including intra-company communications; correspondence; telegrams; memoranda; records; books; summaries or records of telephone communications; summaries or records of personal conversations or interviews; diaries; forecasts; statistical statements; accountants' work papers; graphs;

charts; accounts; analytical records; minutes or records of meetings or conferences; reports and/or summaries of interviews; reports and/or summaries of investigations; opinions or reports of consultants; appraisals; records, reports or summaries of negotiations; brochures; pamphlets; circulars; press releases; contracts; notes; drafts of any documents; photographs; drawings; and other documents or writings of whatever description. Different versions of the same document (e.g., copies of a printed document with different handwritten notations) are different documents.

4. Or means and/or.

5. Person means a natural person, corporation, partnership, association or other organization.

6. You and your refer to Inmobiliaria.

7. The Apartotel refers to an apartment hotel, apartotel or similar structure to be constructed by you in or near Isla Verde, Puerto Rico.

Documents Requested

1. All documents which reflect or refer or relate to the agreement entitled Application for Commitment, a copy of which is attached to the Complaint in this action as Exhibit A, and any actual or proposed amendments to the agreement or to any other understanding or agreement between you and Paine, Webber concerning the financing of the construction of the Apartotel.

2. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication, occurring from January 1, 1971 to date with Paine, Webber or any broker other than Paine, Webber in connection with any financing or proposed financing of the construction of the Apartotel.

3. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date concerning any loan made, or proposed to be made, by Housing Investment Corp., Inc. or The Chase Manhattan Bank, N.A. to you in connection with the construction of the Apartotel or the actual or proposed employment of any broker in connection with such loan.

4. Any other documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date between you and any other person concerning the financing of the construction of the Apartotel.

Plaintiff requests Defendant to respond to the foregoing by October 25, 1973.

The inspection and copying of the documents produced pursuant to this request will take place at the office of Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, New York, at 10:00 A.M. on October 26, 1973.

Dated: New York, New York
September 25, 1973

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway,
New York, New York 10005.
Tel. No. (212) 344-8000

By /s/ Judson A. Parsons, Jr
Attorneys for Plaintiff

TO:
WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
295 Madison Avenue
New York, New York 10017
Attorneys for Defendant

WEISS ROSENTHAL HELLER & SCHWARTZMAN
205 MADISON AVENUE, NEW YORK, N. Y. 10017

[illegible]

(212) 725-1820
CABLE ADDRESS
WEISTHAL

HOWARD MILTON SPECKMAN
MATTHEW L. [illegible]
COUNSEL

October 29, 1973

Judson A. Parsons, Jr., Esq.
Messrs. Dewey Ballantine Bushby
Palmer & Wood
140 Broadway
New York, New York 10005

Re: Paine Webber v. Inmobiliaria

Dear Mr. Parsons:

This will confirm our telephone conversation of October 29 in which we agreed to the following:

1. I will take the deposition of Mr. Wilkes on November 21 at 9:45 A.M. at my office.

2. You will take the depositions of Messrs. Cohen and Berger at your office on December 4 at 9:45 A.M. and 2:30 P.M. respectively.

3. I will get you the documents that you have requested as soon as possible, hopefully prior to November 16.

Thank you for your cooperation.

Very truly yours,

Richard F. Horowitz

cc: Martin Cohen

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD F. HOROWITZ, being duly sworn, deposes and says:

I am a member of the firm of Weiss Rosenthal Heller & Schwartzman, attorneys for defendant and I make this affidavit in opposition to plaintiff's motion pursuant to Rule 37 of the Federal Rules of Civil Procedure.

Defendant has at no time questioned the fact that it must produce for depositions its officers, directors and managing agents with knowledge of the facts involved herein. Defendant has also never questioned the propriety of plaintiff's notice for production of documents.

EXHIBIT B

The only question between the parties regards the dates of compliance with these discovery requests. Apparently, this motion was precipitated by a telephone conversation that I had with counsel for plaintiff in which I advised him that, due to the press of other business, neither Mr. Cohen nor Mr. Berger would be available for depositions during the month of December. I also told counsel that I would be away during most of the month of January. Specifically, I will be taking depositions in Los Angeles on January 8 through January 11 and in San Francisco on January 22 and January 23. From January 12 through January 21, my family and I will be spending a much-needed vacation on the West Coast. I will be returning to my office on Friday, January 25. For these reasons, I advised counsel that I could not reschedule the depositions for any dates prior to the end of January.

Defendant has no objection to the Court fixing dates for the depositions of its officers, directors and/or managing agents at the very end of January or at any time thereafter. We will also produce the remainder of the documents requested by plaintiff in late January or early February.

It is unfortunate that the Court had to be troubled with this scheduling problem. We certainly have not caused any substantial delay in the progress of this matter. The depositions in question can probably be completed in two days, if indeed they take that long.

WHEREFORE, it is respectfully requested that the within motion be denied, except to the extent indicated above.

RICHARD F. HOROWITZ

Sworn to before me this
20th day of December, 1973.

DENISE UTT
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-9410220
Qualified in New York County
Commission Expires March 30, 1974

April 8, 1974

Richard Horowitz, Esq.,
Weiss Rosenthal Heller & Schwartzman,
295 Madison Avenue,
New York, New York 10017.

Re: Paine, Webber v. Inmobiliaria

Dear Mr. Horowitz:

During the deposition of Mr. Cohen I requested that certain of Mr. Cohen's appointment books and telephone and expense records be produced. I would appreciate your advising me whether you will produce those documents.

I would also like to hear from you concerning the production of the documents responsive to Plaintiff's Request for Production which are or were in the possession of Mr. Berger or the Melia organization.

Finally, you will recall that there was some discussion of the production of the documents located in Puerto Rico, and Mr. McClintock has advised me that certain documents were produced at the deposition of Mr. Berger. I would appreciate your confirming that all of the files maintained by Inmobiliaria Melia de Puerto Rico, Inc., Mr. Cohen, Mr. Fullana, and Basic Equities and Development Corp. have been examined and that all of the documents in those files responsive to Plaintiff's Request for Production have been produced.

This will also advise you that we intend to take the Fullana deposition at our offices on April 17. If you still plan to object to this, I ask that you let me know.

Sincerely,

DLC:mkb

Daniel L. Carr

EXHIBIT C

June 26, 1974

Richard P. Horowitz, Esq.,
Weiss, Rosenthal, Heller & Schwartzman,
295 Madison Avenue,
New York, New York 10017.

Re: Paine, Webber v. Inmobiliaria

Dear Mr. Horowitz:

On April 8, 1974, I wrote to you concerning our request for certain documents, and to date I have not received a response.

While I realize that your motion is still pending, I would hope that we could resolve the document question in the meantime, and would appreciate hearing from you.

Sincerely,

Daniel L. Carr

DLC:cdb

EXHIBIT D

BEST COPY AVAILABLE

WEISS ROSENTHAL HELLER & SCHWARTZMAN
295 MADISON AVENUE, NEW YORK, N.Y. 10017

JULIUS WEISS
IRWIN M. ROSENTHAL
JACOB W. HELLER
HERMAN SCHWARTZMAN
LEONARD I. WEINSTOCK
DAVID M. GANEUR
ANDREW DAVE
MARCEL SILVERGOLD
ELIAS ABRAMOWITZ
EDWARD M. COLLER
RICHARD F. HOROWITZ
HOWARD L. MANN
E. EDGAR RAND

HOWARD S. JACOBS
MITCHELL R. MASS
EDWARD E. FINGERMAN
MICHAEL R. SONBERG
BERNARD E. TROY
ELI FEIT
SIMON POSNER

[illegible]
EZRA WEISS

HOWARD [illegible] SCHWARTZMAN

(212) 723-[illegible]

CABLE ADDRESS
WEISSTHAL

October 21, 1974

Daniel Carr, Esq.
Messrs. Dewey Ballantine Bushby
Palmer & Wood
140 Broadway
New York, New York

Re: Paine Webber v. Inmobiliaria

Dear Dan:

I write to confirm that we have no further documents to produce. You made specific inquiry as to whether Mr. Berger has any additional documents. Mr. Berger has indicated to me in writing that he does not.

Sincerely,

Richard F. Horowitz

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

Conformed Copy
U. S. District Court
Filed
NOV 11, 1974
S. D. of N. Y.

73 Civ. 2422 (CBM)

ORDER

Plaintiff Paine, Webber, Jackson & Curtis Incorporated having moved this Court on December 13, 1973 for an order pursuant to Federal Rule of Civil Procedure 37 compelling discovery or imposing sanctions; and

Orders having been filed by this Court on March 5, 1974, and September 11, 1974, directing, inter alia, that the documents whose production was sought by plaintiff's Request for Production dated September 25, 1973 be produced on or before February 26, 1974; that further discovery matters in this action be referred to the undersigned; and that plaintiff's motion be dismissed as moot; and

Counsel for plaintiff having advised the Court by letter dated October 22, 1974, of defendant's continuing failure to produce documents called for by plaintiff's Request and required to be produced by this Court's previous order; and

This matter having come on for a hearing on November 6, 1974, and counsel for both parties having been heard, and it appearing that defendant has failed to comply with this Court's Order of March 5, 1974 insofar as that Order directed the production of documents and that counsel for defendant has made no objection to plaintiff's Request for Production and has informed

the Court of his inability to obtain the required documents from defendant; NOW IT IS

ORDERED that those documents called for by plaintiff's Request for Production dated September 25, 1973, including those documents specifically requested during the deposition of defendant held on February 28 and March 5, 1974, be produced on or before December 15, 1974; and it is further

ORDERED that, failing said production, it is the recommendation of the undersigned that defendant's answer be stricken and judgment be entered for plaintiff.

Dated: New York, New York
November 8, 1974

L. L. Schreiber
United States Magistrate

JA 173

Processing Room Hourly Stock
6/13/75 1:40 P.M.
350

(73 CIV. 2422 (GLG))
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

- against -

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

NOTICE OF CROSS-MOTION AND AFFIDAVIT

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

Attorneys FOR Plaintiff

140 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10005
TELEPHONE 212 344-8000

COPY RECEIVED

THIS_____DAY OF_____19____

_____

_____

_____

(WA)

U.S.D.J.

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3286-37

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

REPLY TO COUNTERCLAIMS

Plaintiff, by its attorneys, Dewey, Ballantine, Bushby, Palmer & Wood, replies to the counterclaims of defendant in this action as follows:

REPLY TO FIRST COUNTERCLAIM

1. Plaintiff admits upon information and belief the allegations set forth in paragraph 6 of the amended answer.

2. Plaintiff admits the allegations set forth in paragraph 7 of the amended answer.

3. Paragraph 8 of the amended answer states a legal conclusion as to which no response is required.

4. Plaintiff admits the allegations set forth in paragraph 9 of the amended answer.

5. Plaintiff admits the allegations set forth in paragraph 10 of the amended answer.

6. Plaintiff admits the allegations set forth in paragraph 11 of the amended answer.

7. Plaintiff denies the allegations set forth in paragraph 12 of the amended answer, except admits that plaintiff had advised defendant that plaintiff had entered into extensive negotiations with and submitted numerous materials to First Mortgage Investors concerning defendant's proposed project.

8. Plaintiff denies the allegations set forth in paragraph 13 of the amended answer, except admits that plaintiff did not encourage defendant to contact alternative lenders while serious negotiations were underway with First Mortgage Investors.

9. Plaintiff denies the allegations set forth in paragraph 14 of the amended answer, except admits upon information and belief that defendant and First Mortgage Investors did not enter into a loan agreement in connection with defendant's proposed apartment hotel project in Puerto Rico.

10. Plaintiff denies upon information and belief the allegations set forth in paragraph 15 of the amended answer, except admits upon information and belief that defendant obtained financing for its proposed apartment hotel project in the amount of approximately $19,000,000 or more.

11. Plaintiff denies the allegations set forth in paragraph 16 of the amended answer.

12. Plaintiff denies the allegations set forth in paragraph 17 of the amended answer.

13. Plaintiff denies the allegations set forth in paragraph 18 of the amended answer.

REPLY TO SECOND COUNTERCLAIM

14. Plaintiff repeats the answers to each paragraph incorporated by reference in paragraph 19 of the amended answer with the same force and effect as if here set forth in full.

15. In response to paragraph 20 of the amended answer, plaintiff admits that, at all relevant times, it was a professional mortgage broker and further states that it was qualified and expert in its area of endeavor.

16. Plaintiff denies the allegations set forth in paragraph 21 of the amended answer.

17. Plaintiff denies the allegations set forth in paragraph 22 of the amended answer.

FIRST AFFIRMATIVE DEFENSE

18. The counterclaims fail to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

19. The counterclaims are barred in whole or in part by laches.

THIRD AFFIRMATIVE DEFENSE

20. The counterclaims are barred in whole or in part by the applicable statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

21. Defendant was guilty of contributory negligence.

FIFTH AFFIRMATIVE DEFENSE

22. The counterclaims are barred in whole or in part by waiver and estoppel.

WHEREFORE, plaintiff demands, in addition to the relief sought in the complaint in this action, judgment dismissing the counterclaims herein; costs and disbursements of this action; and such other and further relief as the Court deems just and proper.

Dated: New York, New York
June 13, 1975

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm

Attorneys for Plaintiff
140 Broadway
New York, New York 10005
(212) 344-8000

3286-37

UNITED STATES DISTRICT COURT
SOUTHERN DIS RICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT PURSUANT TO RULE 9(f)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BOB D. MANNIS, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and am associated with the firm of Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for plaintiff in this action. I make this affidavit pursuant to Rule 9(f) of the General Rules of this Court in support of plaintiff's motion filed herein on June 16, 1975 for an order, pursuant to Rule 37 of the Federal Rules of Civil Procedure, providing for sanctions because of defendant's failure to submit to discovery and for plaintiff's fees and expenses incurred by reason of defendant's conduct.

2. On Thursday, June 19, 1975, I called Mr. Horowitz, attorney for the defendant herein, for the purpose of conferring with him with regard to the issues raised by plaintiff's motion.

3. Mr. Horowitz informed me that, in view of his firm's pending motion for leave to withdraw as counsel of record for defendant and its reasons for that motion stated therein, he could not take a position with respect to plaintiff's motion.

4. Thus, defendant's conduct has halted progress in this case towards either settlement or litigation of the issues. It appears that the issues raised by plaintiff's motion, the appropriateness of Rule 37(b) and (d) sanctions, cannot be resolved without the intervention of this Court.

Bob D. Mannis

Bob D. Mannis

Sworn to before me this 19th day of June, 1975.

Mildred Spiro

Notary Public

MILDRED SPIRO
NOTARY PUBLIC, State of New York
No. 24-9131250
Qualified in Kings County
Certificate Filed in N. Y. County
Commission Expires March 30, 1976

JA 179 Paine Webber v. Dunnebeisaria

OCTOBER 3, 1975

PREPARATION OF 1972 AND 1973 CASES FOR TRIAL

the attached list of 1973 cases previously referred to the magistrates, as indicated thereon, has been set for trial commencing April 1, 1976.

All pre-trial procedures are to be completed by December 1, 1975.

All pre-trial memorandums are to be filed on January 15, 1976.

All pre-trial orders are to be submitted by January 30, 1976.

Attached also is a list of late 1972 cases for assignment to the magistrates for the same schedule as now applies to the 1973 cases. Some of these '72 cases may already be before particular magistrates with respect to discovery motions.

Counsel for plaintiff in each case should be advised that he is responsible for seeing that the above pre-trial schedule is adhered to and that failure to do so will result in dismissal of the case for failure to prosecute.

I will, of course, decide any substantive motion in these cases.

Commencing February 2, 1976, after pre-trial orders have been filed, it is my desire to have each case called in for a final settlement conference before trial.

Thank you all for your cooperation.

rt: /CBM

APRIL JA 180 TRIAL CALENDAR

ON. CONSTANCE BAKER MOTLEY

CALENDAR NUMBER	DOCKET NUMBER	TITLE	DISPOSITION
1	72 CIV 3733	HOLIDAY MAGIC, INC. =V= RAMFORD	
2	72 CIV 3876	ECKHART =V= SCHUBIN	
3	72 CIV 4055	CATALOSI =V= MOORE McCORMACK	
4	72 CIV 4738	FESSLER =V= DEPT. H.E.W.	
5	72 CIV 4862	RAVITZ =V= ELLENBERG	10-8-75 P/T ORDER FILED 10
6	72 CIV 5031	HODGSON =V= INTL. ORG. MASTERS, MATES & PILOTS	
7	72 CIV 5314	CASTRO =V= AMERICAN FOREIGN S.S. CORP.	
8	72 CIV 5380	MARTIN MOTOR SALES, INC =V= SAAB SCANIA OF AMERICA	
9		AMERICAN AIRLINES =V= PHELPS	
10	73 CIV 334	AMERICAN HONDA MOTOR CO. =V= S.S. ALTIS	
11	73 CIV 336	LAGO =V= AMERICAN EXP. ISBR. LINES	
12	73 CIV 646	BYRON =V= CITY OF NEW YORK	
13	73 CIV 653	GRAHAM =V= THOMPSON	
14	73 CIV 610	PICINIC =V= SEA LAND SERVICE	
15	73 CIV 806	CATRAKIS =V= NAUTILUS PETRO. CARRIERS CORP.	
16	73 CIV 951	SEGNA =V= NETUMAR LINE	
17	73 CIV 1105	S.I.P.C. =V= DICKINSON, ETAL.	
18	73 CIV 1234	FIGUEROA =V= AMERICAN PRESIDENT LINES	
19	73 CIV 1257	J.G. FURNITURE CO. =V= LEHIGH LEOPOLD MFG.	
20	73 CIV 1277	ARROYO =V= BERNARD	
21	73 CIV 1360	CANADA WIRE & CABLE CO. =V= S.S. JOSEPHINE	
22	73 CIV 1429	CRUZ =V= POLISH OCEAN LINES	

BEST COPY AVAILABLE

CALENDAR

CALEND. NUMBER	DOCKET NUMBER	TITLE	DISPOSITIONS
23	73 Civ 1231	BREMLER =V= JAPAN AIRLINES	
24	73 Civ 1801	BENTLEY =V= HENDERSON	
25	73 Civ 1904	STAGE FOUR, INC. =V= TRANS-AMERICA	
26	73 Civ 1918	MITCHELL =V= EVEL MARITIME LTD.	
27	73 Civ 2119	SONESTA INT'L. HOTELS =V= WELLINGTON ASSOCS.	
28	73 Civ 2422	PAINE, WEBBER, ETC =V= INMOBILIARIA MELIA	✓
29	73 Civ 2486	WRIGHT =V= FERRARO	
30	73 Civ 2560	LEUMAS KNITTING MILLS =V= PARAMOUNT	
31	73 Civ 2661	ITALIAN AMERICAN CENTER =V= SUGARMAN	
32	73 Civ 2866	PAPERHANDLERS UNION =V= U.S. TRUCKING	
33	73 Civ 2918	SCHUMAN =V= CHANDRIS AMERICAN LINE	
34	73 Civ 2952	RELIANCE MARINE TRANSPORT =V= PAF #1 INC.	
35	73 Civ 2973	ZUCKERMAN =V= SCHWARTZ	
36	73 Civ 3038	GANNEY =V= PRETTY PLEASE BEAUTY SALON	
37	73 Civ 3059	SOTO =V= ODLAND	
38	73 Civ 3073	STANZIALE =V= 1ST NATIONAL CITY BANK	
39	73 Civ 3111	BRENNAN =V= ARNOLD CONSTABLE CORP.	
40	73 Civ 3118	DiSALVO =V= FED'L. EMPLS. GROUP LIFE INS.	
41	73 Civ 3247	MATHEW =V= AMERICAN TRADING TRANSP.	
42	73 Civ 3387	ROSENBAUM =V= RENGAIG PRODUCTIONS, INC.	
43	73 Civ 3387	SILBERBERG =V= H.S. EQUITIES, INC.	
44	73 Civ 3548	LETO =V= ITALIAN LINE	

CALENDAR NUMBER	DOCKET NUMBER	TITLE	DISPOSITION
45	73 CIV 3629	DIANA CIA MARITIMA =V= MAHER STEVEDORING	
46	73 CIV 3672	SHARPMAN =V= INNEES BROWN CONSULTING	
47	73 CIV 3678	TODD SHIPYARDS =V= INDIA SUPPLY MISSION	
48	73 CIV 3790	WARREN =V= HONEST MAC, INC	
49	73 CIV 3842	NICHOLAS =V= U.S.A.	
50	73 CIV 4029	LEWIS =V= CHAPMAN	✓
51	73 CIV 4032	ALVES TILE & MARBLE =V= AMSTERDAM CORP.	
52	73 CIV 4118	CATAPANO =V= POLISH OCEAN LINES	
53	73 CIV 4320	TRANSEASTERN SHIPPING =V= U.S.A.	
54	73 CIV 4361	HAINES =V= PREISER	
55	73 CIV 4363	NARTONICZ =V= APPELATE DIV. 2ND DEPT. N.Y.S.	
56	73 CIV 4569	AMERICAN PRESIDENT LINES =V= NORTHEAST MARINE	
57	73 CIV 4647	STUART =V= BROOKS	
58	73 CIV 4720	BARBARITO =V= GIBBONS	
59	73 CIV 4765	NO. AMERICAN PHILIPS =V= UNIVERSAL CARLOADING	
60	73 CIV 4844	AILON =V= JAEGER	
61	73 CIV 4851	PEREZ =V= POLSKIE OCEAN LINE	
62	73 CIV 4882	INT'L. FOOD SVCE. =V= WARD FOODS, INC.	
63	73 CIV 4937	EHRLICH =V= FRAME	
64	73 CIV 5111	SHARMA =V= CHINESE MARITIME	
65	73 CIV 5135	KEENE =V= N.Y.C. HOUSING AUTH.	
66	73 CIV 5169	MICELLI =V= FLOTA MERCANTE	

S.D.N.Y. JA 183 CALENDAR

CALENDAR NUMBER	DOCKET NUMBER	TITLE	DISPOSITIONS
67	73 CIV 5170	CARAGIULO =V= MORAN TOWING	
68	73 CIV 5374	SNEEDEN =V= NAT'L. TRANS. CORP.	
69	73 CIV 5406	KEUFFEL & ESSER CO. =V= AMER. INT'L. UNDERWRITERS	
70	73 CIV 5430	GRBIC =V= EMPRESA LINEAS	
71	73 CIV 5218	PEACE CANNING =V= S.S. E. YUNG	
1-A	72 CIV 3357	THE COCA COLA CO. =V= CHIARELLI	
3A	73 CIV 1207	RODRIGUEZ =V= BUTLER	
17-A	73 CIV 2227	LEVITT =V= SEA-LAND SVCE., INC	P/T ORDER FILED 9-22-75
61-A	73 CIV 4066	BARGE POLING BROS. =V= SKIBS AS NAMSET	P/T ORDER FILED 9-22-75
62-A	73 CIV 4307	STRETCH =V= FIGLER	
79-A	73 CIV 4836	KOREAN SHIPPING CORP. =V= THIRD EYE, INC	
83-A	73 CIV 4947	GONZALEZ =V= DEPT. H.E.W.	
85-A	73 CIV 6137	SOUTHWEST =V= S.S. E. YUNG	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED, Plaintiff,	73 Civ. 2422 (CBM)
-against-	NOTICE TO PRODUCE PURSUANT TO RULE 34
INMOBILIARIA MELIA DE PUERTO RICO, INC., Defendant.	

S I R S:

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiff, Paine, Webber, Jackson & Curtis Incorporated requests that defendant, Inmobiliaria Melia de Puerto Rico, Inc. produce and permit Paine, Webber to inspect and copy the documents described below at 10:00 A.M. on January 5, 1976 at the offices of its attorneys Dewey, Ballantine, Bushby, Palmer & Wood, 46th Floor, 140 Broadway, New York, New York 10005. This notice does not request production of documents which have heretofore been produced in response to plaintiff's request for production dated September 25, 1973.

DEFINITIONS

1. "Inmobiliaria" means Inmobiliaria Melia de Puerto Rico, Inc., or any of its present or former affiliates, subsidiaries, officers, directors, employees, agents, representatives and attorneys.

2. "Paine, Webber" means Paine, Webber, Jackson & Curtis Incorporated, or any of its present or former affiliates, subsidiaries, officers, directors, employees, agents, representatives and attorneys.

3. "Documents" means all originals and any copy of the following items, whether printed or recorded, or reproduced by any other mechanical process, or written or produced by hand: agreements; communications, including intra-company communications; correspondence; telegrams; memoranda; records; books; summaries or records of telephone communications; summaries or records of personal conversations or interviews; diaries, including, but not limited to, those with calendar entries indicating dates of any meetings, discussions or conversations; forecasts; statistical statements; accountants' work papers; graphs; charts; accounts; books of account; ledgers; budgets; financial statements; projections or calculations; analytical records; minutes or records of meetings or conferences; reports and/or summaries of interviews; reports and/or summaries of investigations; opinions or reports of consultants; appraisals; analyses; surveys; records, reports or summaries of negotiations; brochures; pamphlets; circulars; press releases; contracts; notes; jottings; drafts, outlines and proposals of any documents (whether or not actually used); photographs; drawings; and other documents or writings of whatever description in the possession, custody or control of the defendant. Different versions of the same document (e.g., copies of a printed document with different handwritten notations) are different documents.

4. The words "and" and "or" shall be both conjunctive and disjunctive.

5. "Person" means a natural person, corporation, partnership, association or other organization or entity, and includes any such person controlled, controlling or under common control with any such person.

6. "The Apartotel" refers to an apartment hotel, apartotel or similar structure to be constructed, under construction or already construction by Inmobiliaria in or near Isla Verde, Puerto Rico.

DOCUMENTS TO BE PRODUCED

1. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date between Inmobiliaria, Paine, Webber, and First Mortgage Investors, or between any of them, or by any of them to any other person, concerning any loan made, or proposed to be made, by First Mortgage Investors in connection with any financing or proposed financing of the construction of the Apartotel.

2. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date between Inmobiliaria and Paine, Webber concerning efforts, action or inaction by either Inmobiliaria or Paine, Webber to secure financing of the construction of the Apartotel or by which Inmobiliaria was dissuaded from seeking, other than through the efforts of Paine, Webber, financing of the construction of the Apartotel.

3. All documents which reflect or refer or relate to any discussion, understanding, communication or representation occurring from January 1, 1971 to date between Inmobiliaria and Paine, Webber or any other person concerning Paine, Webber's qualifications, experience, expertise or ability in securing loan commitments or in the areas of international financial matters or mortgage brokerage.

4. All documents which reflect or refer or relate in any way to any proposed or acutal schedule, or delays in any such schedule, for construction of the Apartotel.

5. All documents which reflect or refer or relate in any way to any estimated or actual financial loss or damages suffered by Inmobiliaria in connection with or arising from the construction of the Apartotel, including, but not limited to, any such losses arising from delays in obtaining financing or in the commencement or progression of construction.

Dated: New York, New York
December 5, 1975

Yours, etc.

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm
Attorneys for Plaintiff
140 Broadway
New York, New York 10005
Telephone: (212) 344-8000

TO: WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

NOTICE OF DEPOSITION

S I R S:

PLEASE TAKE NOTICE that, at the offices of Dewey, Ballantine, Bushby, Palmer & Wood, 46th Floor, 140 Broadway, New York, New York, before a notary public, or before some other officer authorized by law to administer oaths, pursuant to Rule 30 of the Federal Rules of Civil Procedure, the plaintiff, Paine, Webber, Jackson & Curtis Incorporated will take the deposition upon oral examination of defendant Inmobiliaria Melia de Puerto Rico, Inc., a Puerto Rican corporation with its principal offices in Hato Rey, Puerto Rico, by Jack H. Berger, at 10:00 o'clock in the forenoon on January 13, 1976; by Martin Cohen, at 10:00 o'clock in the forenoon on January 14, 1976; and thereafter, by such other directors, officers, agents and employees of defendant as may have knowledge of the facts underlying the issues raised by the pleadings in this action, including the amended answer and counterclaim of defendant. The examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated: New York, New York
December 5, 1975

Yours, etc.

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm
Attorneys for Plaintiff
140 Broadway
New York, New York 10005
Telephone: (212) 344-8000

TO: WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017

JA 190 3151

Copy

#36

December 10, 1975

Judge Motley

Magistrate Schreiber

Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc.
73 Civ. 2422

Attached please find my recommended order in the above action concerning the defendant's motion for the imposition of sanctions and on the cross motion by plaintiff's counsel to be relieved. A copy of this recommended order has been sent to respective counsel and they have been advised that if they wish to file any opposition to my order, they should do so by filing papers with Your Honor not later than December 20, 1975.

Respectfully,

Sol Schreiber

cc: Bob D. Mannis, Esq.
Richard F. Horowitz, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

MAGISTRATE'S ORDER

----------x

Attorneys for defendant Inmobiliaria Melia de Puerto Rico, Inc. having moved this Court on June 3, 1975 for an order pursuant to Rule 4(c) of the General Rules of this Court permitting them to withdraw as counsel of record; and

Plaintiff Paine, Webber, Jackson & Curtis Incorporated having cross-moved this Court on June 13, 1975 for an order pursuant to Federal Rule of Civil Procedure 37 imposing sanctions and awarding plaintiff reasonable expenses, including attorneys' fees, incurred by reason of defendant's conduct; and

Orders having been filed by this Court on March 5, 1974, September 11, 1974, November 11, 1974, and September 8, 1975, directing, inter alia, that the documents whose production was sought by plaintiff's request for production dated September 25, 1973 be produced on or before February 26, 1974 and, subsequently, that such documents, including those documents specifically requested during the deposition of defendant held on February 28 and March 5, 1974, be produced on or before December 15, 1974; that defendant appear for its oral examination by Mr. Fullana; and that this motion and action be referred to Magistrate Schreiber for a hearing, report and supervision of all pretrial proceedings; and

This Court having directed defendant at a conference with Magistrate Schreiber held on December 18, 1974 to supply affidavits indicating that plaintiff's request for documents has been complied with fully, if no further documents are produced; and

A decision of this Court having been filed on March 31, 1975 denying defendant's motion to relocate to Puerto Rico from New York its deposition by Mr. Fullana; and

This matter having come on for a hearing on December 1, 1975 before Magistrate Schreiber and counsel for both parties having been heard; and it appearing that defendant has failed to comply with this Court's orders insofar as they direct the production of documents or affidavits in lieu thereof and the appearance of defendant for its oral examination by Mr. Fullana; and that counsel for defendant should not be permitted to withdraw as counsel of record in this case without adequate provision being made for the immediate substitution of other counsel; NOW IT IS

ORDERED that those documents called for by plaintiff's request for production dated September 25, 1973, and all those documents requested by plaintiff during the deposition of defendant held on February 28 and March 5, 1974, be produced at the office of plaintiff's attorneys by January 15, 1976; or, in lieu thereof, that defendant produce affidavits of Messrs. Berger, Cohen and Fullana indicating that said requests have been complied with fully; and that defendant appear for its oral examination by Mr. Fullana, pursuant to plaintiff's notice of deposition dated September 25, 1973 and the prior orders and decision of this Court, on January 22, 1976; and it is further

ORDERED that plaintiff be allowed to complete all other discovery within ninety days after filing of this Order; and it is further

ORDERED that counsel for defendant be allowed to withdraw as counsel of record in this case only upon the condition that new counsel of record be substituted by defendant contemporaneously with present counsel's withdrawal and that no further delay in this case be occasioned by such withdrawal and substitution; and it is further

ORDERED that final decision on plaintiff's pending cross-motion dated June 13, 1975 for imposition of sanctions is held in abeyance pending defendant's production of documents or affidavits and appearance at oral examination.

Dated: New York, New York
December 9, 1975.

United States District Judge

So ordered
L. Kelley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

----------X

73 Civ. 2422 (CBM)

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of RICHARD F. HOROWITZ, sworn to January 15, 1976, the order of this Court dated January 12, 1976 and all prior proceedings in this matter, the undersigned will move this Court, before Honorable Constance Baker Motley, United States District Judge at the United States Courthouse, Foley Square, New York, New York on the 23rd day of January, 1976 at 10:00 A.M. or as soon thereafter as counsel can be heard for an order reconsidering and vacating this

this Court's order of January 12, 1976 and granting the proposed order recommended by United States Magistrate Sol Schreiber on December 10, 1975 and granting defendant such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 15, 1976

Yours, etc.

WEISS ROSENTHAL HELLER & SCHWARTZMAN

By: _____
A Member of the Firm
Attorneys for Defendant
295 Madison Avenue
New York, New York 10017
(212) 725-9200

TO:

Dewey, Ballantine, Bushby,
Palmer & Wood
140 Broadway
New York, New York 10005
(212) 344-8000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT

----------X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

RICHARD F. HOROWITZ, being duly sworn deposes and says:

1. I am a member of the firm of WEISS ROSENTHAL HELLER & SCHWARTZMAN, attorneys for defendant and I make this affidavit in support of defendant's motion for an order reconsidering and vacating this Court's order of January 12, 1976 and granting the order proposed by Magistrate Schreiber on December 10, 1975.

2. On June 13, 1975, plaintiff moved, pursuant to Rule 37 of the Federal Rules of Civil Procedure for sanctions for defendant's failure to submit to discovery. Counsel for defendant had previously moved for permission to withdraw.

3. On December 1, 1975, a conference was held before Magistrate Schreiber, to whom the motions had been referred for recommendation. I appeared at the conference as did Bob D. Mannis, Esq. of the firm of Dewey, Ballantine, Bushby, Palmer & Wood.

4. Magistrate Schreiber announced that it was his recommendation that the motions be disposed of as follows:

a) Defendant would be directed to appear for deposition by Mr. Fullana at a date to be selected in January 1976,

b) Defendant would be directed to produce certain documents requested by plaintiff or affidavits indicating that the requests had already been complied with fully, and

c) We would be permitted to withdraw only if new counsel were substituted for us and on condition that no further delay in the case be occasioned by our withdrawal and substitution.

5. Mr. Mannis and I both expressed to Magistrate Schreiber our unreserved and complete agreement with the Magistrate's recommendation. Magistrate Schreiber suggested that Mr. Mannis prepare a proposed order, submit it to me for my comments and then to Magistrate Schreiber for his review and submission to the Court. Mr. Mannis prepared a proposed order which he forwarded to me together with a covering letter of December 5, 1975. Copies of Mr. Mannis' letter of December 5, 1975 and the proposed order enclosed therewith are annexed hereto as Exhibits "A" and "B" respectively.

6. I promptly advised Mr. Mannis that I had no objection to the proposed order that he had prepared at the direction of the Magistrate. Mr. Mannis then submitted the proposed order to Magistrate Schreiber with a covering letter dated December 9, 1975 (Exhibit "C" hereto).

7, The next day, December 10, 1975, Magistrate Schreiber

transmitted the the Court the proposed order which, except with regard to certain minor differences in dates, was identical to the order submitted by Mr. Mannis. Copies of Magistrate Schreiber's transmittal memorandum to the Court and the "Magistrates order" of December 9, 1975 signed by Magistrate Schreiber are annexed hereto as Exhibits "D" and "E".

8. Both sides unquestionably proceeded on the assumption that the proposed order submitted to the Court by Magistrate Schreiber, to which both sides had unqualifiably agreed and which was prepared by counsel for plaintiff would be signed by the Court.

9. Mr. Fullana advised me that he would arrive in New York city on January 13, 1976 and asked me whether I could arrange to have his deposition taken on January 14, 1976. On January 12, 1976 I called counsel for plaintiff and put that request to them. Proceeding on the assumption that the order recommended by the Magistrate would be signed, they agreed to take Mr. Fullana's deposition on January 14. In fact on January 13, Mr. Fullana appeared at my office for the purpose of discussing his contemplated deposition testimony, to be given on January 14.

10. Late in the afternoon on January 12, 1976 I was advised by counsel for plaintiff of this Court's handwritten endorsed order of January 12 (Exhibit "F" hereto) in which the Court rejected Magistrate Schreiber's proposed order and directed that a judgment of default be entered.

11. This Court's order of January 12 does not explain why the proposed order of Magistrate Schreiber was rejected. We respectfully suggest that, having been made aware of all of the facts and circumstances, this Court will decide to reconsider its order of January 12 and grant the order proposed by Magistrate Schreiber on December 10, 1975. We believe that the Court should bear in mind the following facts:

a) The resolution of the motions contained in the proposed order was first suggested by Magistrate Schreiber,

b) Both sides agreed to the suggestions of Magistrate Schreiber, without qualification or reservation,

c) Counsel for plaintiff never objected to Magistrate Schreiber's suggestion and, at the conference before

the Magistrate on December 1, 1975 never demanded a default judgment,

d) Counsel for plaintiff willingly accepted the suggestion of Magistrate Schreiber to the effect that plaintiffs' lawyers prepare the proposed order,

e) Plaintiffs' lawyers prepared the proposed order and we agreed to it,

f) Magistrate Schreiber signed the proposed order and recommended it to the Court, giving the parties a period of ten days to object to it,

g) Neither side ever objected to the proposed order,

h) As late as January 12,1976, the very day that this Court granted its order for a default judgment, both sides were proceeding on the assumption that the order proposed by Magistrate Schreiber on December 10 would be entered.

12. In all of these circumstances, we respectfully submit that it would be a manifest injustice to permit the entry of a default judgment in a sum in excess of $300,000.00. We urge the Court to reconsider its order of January 12, and to grant the order proposed by Magistrate Schreiber on December 10, which represents the Magistrate's recommendation, fully agreed to by both parties and actually prepared by counsel for plaintiff.

WHEREFORE, it is respectfully requested that the within motion be granted in all respects.

RICHARD F. HOROWITZ

Sworn to before me this
15th day of January, 1976.

Notary Public

MICHAEL P. [illegible]
Notary [illegible] New York
[illegible]
Qualified in [illegible] County
Commission Expires [illegible]

OFFICE COPY.

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 BROADWAY
NEW YORK 10005

1776 F STREET, N W
WASHINGTON, D. C. 20006
TELEPHONE (202) 872-1171
CABLE: DEWBALAW

TELEPHONE: (212) 344-8000
TELEX: 12-6825 (DOMESTIC) 620252 (INTERNATIONAL)
CABLE: DEWBALAW

45, AVENUE GEORGE V
75008 PARIS, FRANCE
TELEPHONE 720 85 21
TELEX: 62297
CABLE: DEWBALAW

December 5, 1975

Richard F. Horowitz, Esq.,
Weiss Rosenthal Heller & Schwartzman,
295 Madison Avenue,
New York, New York 10017.

Re: Paine, Webber, Jackson & Curtis Incorporated
v. Inmobiliaria Melia de Puerto Rico, Inc.

Dear Mr. Horowitz:

As Magistrate Schreiber requested during our conference on December 1, 1975, I have enclosed a copy of the order which we propose to send to the Magistrate on December 10, 1975. As we discussed during the conference, the order provides that Paine, Webber is allowed to complete all its discovery within 90 days after the filing of the order and that your firm will be allowed to withdraw as counsel of record for defendant only upon the condition that new counsel of record is substituted at the same time.

Although Magistrate Schreiber indicated we would be allowed 90 days after filing of the order to complete our discovery, there is no reason to delay any further in progressing with discovery and, accordingly, I have suggested in the order that documents be produced by January 5, 1976 and that Mr. Fullana's deposition be taken on January 12, 1976. As I indicated during the conference, plaintiff has yet to have discovery with respect to defendant's counterclaims. In order to have that discovery coincide with the discovery which is the subject of the proposed order, we have today noticed the depositions of Messrs. Berger and Cohen on January 13 and 14, 1976 and have requested production of documents relating to defendant's counterclaims on January 5, 1976.

Sincerely,

Bob D. Mannis

Bob D. Mannis

Enclosures

EXHIBIT A

SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

ORDER

Attorneys for defendant Inmobiliaria Melia de Puerto Rico, Inc. having moved this Court on June 3, 1975 for an order pursuant to Rule 4(c) of the General Rules of this Court permitting them to withdraw as counsel of record; and

Plaintiff Paine, Webber, Jackson & Curtis Incorporated having cross-moved this Court on June 13, 1975 for an order pursuant to Federal Rule of Civil Procedure 37 imposing sanctions and awarding plaintiff reasonable expenses, including attorneys' fees, incurred by reason of defendant's conduct; and

Orders having been filed by this Court on March 5, 1974, September 11, 1974, November 11, 1974, and September 8, 1975, directing, inter alia, that the documents whose production was sought by plaintiff's request for production dated September 25, 1973 be produced on or before February 26, 1974 and, subsequently, that such documents, including those documents specifically requested during the deposition of defendant held on February 28 and March 5, 1974, be produced on or before December 15, 1974; that defendant appear for its oral examination by Mr. Fullana; and that this motion and action be referred to Magistrate Schreiber for a hearing, report and supervision of all pretrial proceedings; and

EXHIBIT B

This Court having directed defendant at a conference with Magistrate Schreiber held on December 18, 1974 to supply affidavits indicating that plaintiff's request for documents has been complied with fully, if no further documents are produced; and

A decision of this Court having been filed on March 31, 1975 denying defendant's motion to relocate to Puerto Rico from New York its deposition by Mr. Fullana; and

This matter having come on for a hearing on December 1, 1975; and counsel for both parties having been heard; and it appearing that defendant has failed to comply with this Court's orders insofar as they direct the production of documents or affidavits in lieu thereof and the appearance of defendant for its oral examination by Mr. Fullana; and that counsel for defendant should not be permitted to withdraw as counsel of record in this case without adequate provision being made for the immediate substitution of other counsel; NOW IT IS

ORDERED that those documents called for by plaintiff's request for production dated September 25, 1973, and all those documents requested by plaintiff during the deposition of defendant held on February 28 and March 5, 1974, be produced at the office of plaintiff's attorneys by January 5, 1976; or, in lieu thereof, that defendant produce affidavits of Messrs. Berger, Cohen and Fullana indicating that said requests have been complied with fully; and that defendant appear for its oral examination by Mr. Fullana, pursuant to plaintiff's notice of deposition dated September 25, 1973 and the prior orders and decision of this Court, on January 12, 1976; and it is further

ORDERED that plaintiff be allowed to complete all other discovery within ninety days after filing of this Order; and it is further

ORDERED that counsel for defendant be allowed to withdraw as counsel of record in this case only upon the condition that new counsel of record be substituted by defendant contemporaneously with present counsel's withdrawal and that no further delay in this case be occasioned by such withdrawal and substitution; and it is further

ORDERED that final decision on plaintiff's pending cross-motion dated June 13, 1975 for imposition of sanctions is held in abeyance pending defendant's production of documents or affidavits and appearance at oral examination.

Dated: New York, New York
December , 1975.

United States District Judge

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 BROADWAY
NEW YORK 10005

TELEPHONE: (212) 344-6000
TELEX: 12-6825 (DOMESTIC) 620252 (INTERNATIONAL)
CABLE: DEWBALAW

44, AVENUE GEORGE V
75008 PARIS, FRANCE
TELEPHONES: 720.28.98
720.01.95, 720.62.67
TELEX: 62297
CABLE: DEWBALAW

December 9, 1975

The Honorable Sol Schreiber,
United States Magistrate,
United States Courthouse,
Foley Square,
New York, New York 10007.

Re: Paine, Webber, Jackson & Curtis, Incorporated v. Inmobiliaria Melia de Puerto Rico, Inc., 73 Civ. 2422 (CBM)

Dear Magistrate Schreiber:

As you requested during our conference on December 1, 1975, I enclose a copy of a proposed order in the above action. Mr. Horowitz, counsel for defendant, has seen a copy of this order and agrees with its content.

Pursuant to your suggestion, the proposed order provides that plaintiff is allowed to complete discovery within ninety days after filing of the order. Since specific dates were not discussed during the conference, we have proposed that still-outstanding documents, or affidavits in lieu thereof, be produced by January 5, 1976 and that Mr. Fullana's deposition be taken on January 12, 1976.

Plaintiff has yet to have discovery with respect to defendant's counterclaims. In an effort to have that discovery coordinated with the discovery which is the subject of the proposed order, we have noticed additional depositions of the defendant on January 13 and 14, 1976 and have requested production of documents relating to defendant's counterclaims on January 5, 1976. The depositions and document production with respect to the counterclaims are not specifically included within the proposed order except insofar as the ninety day period applies.

EXHIBIT C

Copy

Judge Motley

December 10, 1975

Magistrate Schreiber

Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc.
73 Civ. 2422

Attached please find my recommended order in the above action concerning the defendant's motion for the imposition of sanctions and on the cross motion by plaintiff's counsel to be relieved. A copy of this recommended order has been sent to respective counsel and they have been advised that if they wish to file any opposition to my order, they should do so by filing papers with Your Honor not later than December 20, 1975.

Respectfully,

Sol Schreiber

cc: Bob D. Mannis, Esq.
Richard F. Horowitz, Esq.

EXHIBIT D

proceedings; and

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

MAGISTRATE'S ORDER

Attorneys for defendant Inmobiliaria Melia de Puerto Rico, Inc. having moved this Court on June 3, 1975 for an order pursuant to Rule 4(c) of the General Rules of this Court permitting them to withdraw as counsel of record; and

Plaintiff Paine, Webber, Jackson & Curtis Incorporated having cross-moved this Court on June 13, 1975 for an order pursuant to Federal Rule of Civil Procedure 37 imposing sanctions and awarding plaintiff reasonable expenses, including attorneys' fees, incurred by reason of defendant's conduct; and

Orders having been filed by this Court on March 5, 1974, September 11, 1974, November 11, 1974, and September 8, 1975, directing, inter alia, that the documents whose production was sought by plaintiff's request for production dated September 25, 1973 be produced on or before February 26, 1974 and, subsequently, that such documents, including those documents specifically requested during the deposition of defendant held on February 28 and March 5, 1974, be produced on or before December 15, 1974; that defendant appear for its oral examination by Mr. Fullana; and that this motion and action be referred to Magistrate Schreiber for a hearing, report and supervision of all pretrial proceedings; and

EXHIBIT E

This Court having directed defendant at a conference with Magistrate Schreiber held on December 18, 1974 to supply affidavits indicating that plaintiff's request for documents has been complied with fully, if no further documents are produced; and

A decision of this Court having been filed on March 31, 1975 denying defendant's motion to relocate to Puerto Rico from New York its deposition by Mr. Fullana; and

This matter having come on for a hearing on December 1, 1975, and counsel for both parties having been heard; and it appearing that defendant has failed to comply with this Court's orders insofar as they direct the production of documents or affidavits in lieu thereof and the appearance of defendant for its oral examination by Mr. Fullana; and that counsel for defendant should not be permitted to withdraw as counsel of record in this case without adequate provision being made for the immediate substitution of other counsel; NOW IT IS

ORDERED that those documents called for by plaintiff's request for production dated September 25, 1973, and all those documents requested by plaintiff during the deposition of defendant held on February 28 and March 5, 1974, be produced at the office of plaintiff's attorneys by January 5, 1976; or, in lieu thereof, that defendant produce affidavits of Messrs. Berger, Cohen and Fullana indicating that said requests have been complied with fully; and that defendant appear for its oral examination by Mr. Fullana, pursuant to plaintiff's notice of deposition dated September 25, 1973 and the prior orders and decision of this Court, on January 12, 1976; and it is further

ORDERED that plaintiff be allowed to complete all other discovery within ninety days after filing of this Order; and it is further

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

US DISTRICT COURT
FILED
JAN 22 1976
S.D. OF N.Y.

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

ORDER & JUDGMENT IN DEFAULT

#76,061

This cause came to be heard on plaintiff's cross-motion dated June 13, 1975 for an order pursuant to Federal Rule of Civil Procedure 37 imposing sanctions upon the defendant and awarding plaintiff reasonable expenses, including attorneys' fees, incurred by reason of defendant's conduct; and

WHEREAS by order of this Court filed on March 5, 1974 defendant was ordered to produce on or before February 26, 1974 documents whose production was sought by plaintiff's request for production of documents dated September 25, 1973 and to appear on April 17, 1974 for its oral examination by Mr. Fullana; and

WHEREAS by order of this Court filed on September 11, 1974 plaintiff's previous motion, dated December 13, 1973, for an order compelling discovery or imposing sanctions was dismissed as moot based upon this Court's order filed March 5, 1974; and

WHEREAS by order of this Court filed on November 11, 1974, after counsel for both parties having been heard and pursuant to findings by this Court that the defendant had failed to comply with this Court's order of March 5, 1974, insofar as it directed the production of documents, and that no objection had been made to plaintiff's request for production, defendant was

#24

rm JA 212

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,

Plaintiff

vs. 73 Civ. 2422

IMMOBILIARIA MELIA DE PUERTO RICO, INC., (CBM)

Defendant

- x

Before:

Hon. Constance Baker Motley,

District Judge

New York, N. Y.

January 21, 1976 - 4.20 P.M.

APPEARANCES

Dewey, Ballantine, Bushby, Palmer & Wood, Esqs.,
Attorneys for Plaintiff
By: JUDSON A. PARSONS, JR., ESQ. and
BOB DAVIS MANNIS, ESQ.,
of Counsel

Weiss, Rosenthal, Heller & Schwartzman, Esqs.,
Attorneys for Defendant
By: RICHARD F. HOROWITZ, ESQ.,
of Counsel

THE COURT: Are you Mr. Horowitz?

MR. HOROWITZ: Yes, your Honor.

THE COURT: Mr. Horowtiz, I have your letter of January 15th asking for a reconsideration of an order which I entered in this matter on January 12, 1976.

On January 12, 1976, I endorsed a motion made by plaintiff for sanctions pursuant to the provisions of Rule 37(b)(2) and 37(d) for failure of the defendant to comply with prior orders of this Court relating to the production of certain documents by defendants and relating to the taking of the defendant's deposition.

That order of January 12th, as I indicated, was an endorsement on the motion and it rejected a proposed order prepared by Magistrate Schreiber on December 9th which would have extended the time of the plaintiff to complete pretrial discovery for another ninety days and again permit the defendant an opportunity to produce certain documents and appear for the taking of a deposition on January 12th.

On January 12th, I gather the defendant did not appear for its deposition --

MR. PARSONS: That is correct.

THE COURT: -- in accordance with the proposed order. And in addition it appears that after the parties were notified of the Court's January 12th order, the

defendant decided to appear the next day, the 13th or the 14th, for the taking of the deposition; is that so?

MR. HOROWITZ: Your Honor, before I respond and attempt to clarify the situation because, respectfully, the Court has a misapprehension here, I wonder if the Court has my actual motion papers for reconsideration.

THE COURT: Yes, I do.

MR. HOROWITZ: Firstly, your Honor, the order submitted by Magistrate Schreiber was not prepared by Magistrate Schreiber; it was prepared by my friends on the other side of the table. Magistrate Schreiber had suggested it and all of us agreed to it and Mr. Mannis prepared it.

Secondly, your Honor, it directed that Mr. Fullana of the defendant appear on January 22nd, not on January 12th. I have it in front of me, the order recommended by Magistrate Schreiber.

I was advised late in the week of January 5th that Mr. Fullana would be coming to New York the week of January 12th, and he asked me if it was possible for me to arrange for his deposition to be taken on January 14th, which was last Wednesday.

I called -- I forgot whether it was Mr. Parsons or Mr. Mannis, but it was one of them, I believe it was Mr. Parsons -- and asked him if they would consent to take

Mr. Fullana's deposition on January 14th. They said to me they would take it, they would consent to taking it.

Later that same day, January 12th, late in the afternoon Mr. Parsons called me, after agreeing to take the deposition on the 14th, and said to me, in effect, that he had just learned that your Honor had entered the endorsed order, the handwritten endorsed order, of January 12th rejecting the proposed order submitted by Magistrate Schreiber and directing a default judgment, and Mr. Parsons indicated to me that in light of that action by the Court he did not feel it would be appropriate to take Mr. Fullana's deposition on January 14th.

So it is therefore incorrect, your Honor, with all possible respect, to suggest that we did not produce Mr. Fullana in accordance with the proposed order of Magistrate Schreiber. We in fact endeavored to produce him earlier than that order called for and we would have, and both sides were proceeding on the assumption that we would --

THE COURT: You say that Magistrate Schreiber's order calls for Mr. Fullana's deposition to be taken on January 22, 1976 as opposed to January 12th?

MR. HOROWITZ: Yes, your Honor.

THE COURT: Well, you attached a copy of the order here, on the bottom of page 2, and it says January

12th, in the copy you furnished me.

MR. HOROWITZ: That is the wrong one, your Honor. This is the order as prepared by Mr. Mannis. The order as recommended by Magistrate Schreiber contained revisions by Magistrate Schreiber, and here is the Magistrate's order and you will see that what he did was, in handwriting, to change from January 12th to January 22nd and submitted that proposed order your Honor has in front of you --

THE COURT: Is that right?

MR. PARSONS: In part, yes. I would have some things to add to it.

THE COURT: It is not initialed here.

MR. HOROWITZ: Your Honor, Magistrate Schreiber's memorandum to your Honor, attached to which is the same order, and his memo is dated the 10th of December, says, in effect: If you people have objections to this order I am proposing to Judge Motley, please let her know in writing by filing papers not later than December 20th.

And nobody ever said they objected to that order.

THE COURT: Of course, January 20th was Monday.

MR. HOROWITZ: We are talking about December, your Honor.

THE COURT: Let me see a copy of his memorandum so I can get the date clear in my mind.

MR. HOROWITZ: That is also attached to the motion papers, your Honor. This is Magistrate Schreiber's memorandum of December 10, 1975. He gave us until December 20th to object to the order.

THE COURT: Now that we have clarified those dates, on January 12th, after receiving Magistrate Schreiber's memo to me of December 10th with his proposed order and the proposed revised date for taking the deposition of Fullana, revising the date from January 12th to January 22nd, the Court entered an order refecting the Magistrate's report and notified the plaintiff's counsel to submit an order granting a default judgment in this case.

The reason for that is that this case is on a trial calendar, is it not?

MR. HOROWITZ: I don't believe it is, your Honor.

THE COURT: All 1973 cases are not on that calendar?

MR. PARSONS: You sent us an order --

THE COURT: I would like to see the order relating to 1973 cases.

MR. PARSONS: I am not sure it was an order.

You sent us this piece of paper, Judge, and I assume a copy went to the defendant --

THE COURT: Yes. I have reference to this memorandum dated October 3rd relating to 1972 cases, that is, the latter half of 1972, and all 1973 cases, which went to all counsel in those cases, and with respect to that the memorandum notifies all counsel in '73 cases that all pretrial procedures are to be completed by December 1st, all pretrial memos are to be filed by January 15th, and all pretrial orders are to be submitted by January 30th.

This case fell into that category, and I reviewed the file in the case and the proposed order of the Magistrate, which recited the history of the plaintiff's efforts to get this pretrial discovery over with, and the Court, as I indicated, rejected the Magistrate's proposed order and granted the relief originally requested.

I gather from your letter, Mr. Horowitz, that your suggestion is that the plaintiff is not pressing for the relief originally requested, is that it? Is that the purpose of this motion to reconsider?

MR. HOROWITZ: That is not quite it. My letter, as opposed to my motion, relates to the order they submitted on January 14th per the direction contained in your Honor's order of January 12th.

All that the letter says is that I request that your Honor postpone consideration of their proposed order of January 14th pending your review of my motion for reconsideration of the order of January 12th and the determination of --

THE COURT: Well, we are now reviewing it. What is your reason why the proposed order I directed the plaintiff to submit should not now be signed?

MR. HOROWITZ: The reason was that I did not think that certain critical facts were made available to the Court and that on consideration of those facts the Court might wish to rethink the resolution contained in the endorsed order of January 12th, specifically that from December 1, 1975, the date of the last conference before Magistrate Schreiber, through and including January 12th of this year, when we were talking with counsel for plaintiff about taking the deposition of Mr. Fullana on January 14th, they and we were proceeding on the assumption that Magistrate Schreiber's proposed order would be signed by the Court.

THE COURT: Let me ask you this. The Court had not signed that order?

MR. HOROWITZ: That is correct.

THE COURT: Are you suggesting the Court is

bound by the report of the Magistrate?

MR. HOROWITZ: I would not presume to suggest that, your Honor. I appreciate that the Court has discretion to accept or to reject or to modify the recommendations of the Magistrate and I am in the process of suggesting to the Court reasons why I think that the Court would want to accept the recommendation of the Magistrate.

On December 1st, Magistrate Schreiber had before him all of the facts relating to the prior efforts of the plaintiff to secure discovery in this case. He also had before him my motion, cross motion, to withdraw as counsel in the case.

Magistrate Schreiber at the beginning of the meeting, and Mr. Mannis was there and he can correct me if his recollection differs from mine, said in substance, "I suggest that this problem be resolved as follows" --

THE COURT: Who said that?

MR. HOROWITZ: Magistrate Schreiber: "I suggest that an order be prepared giving the defendant one more last chance; that Mr. Fullana be directed to appear for a deposition on a specified date in January 1976; that defendant be directed to produce the documents that plaintiff sought on another specified date in January 1976, or alternatively, affidavits from the principals of the

defendant indicating that they had already made complete production of documents and had no more documents to produce" and that my motion, or my firm's motion, to withdraw as counsel would not be granted unless substitute counsel were obtained and the withdrawal and substitution of my firm and the appearance of another firm would not result in delay of the progress of this matter.

I said that was all right with me. Mr. Mannis said it was all right with him. Magistrate Schreiber suggested that Mr. Mannis prepare the order. Mr. Mannis and I both said that that was fine with us.

Magistrate Schreiber suggested that Mr. Mannis submit a proposed order to me for my review. We both assented to that. Mr. Mannis submitted a proposed order to me. I called him on the phone immediately on receipt and review of it, the same day, and I said, "Bob, the order is fine with me. Go ahead and submit it to the Magistrate."

He submitted it to the Magistrate. Within a few days thereafter Magistrate Schreiber sent to your Honor the transmittal memo of December 10, 1975 and essentially, in substance, the very same order prepared by Mr. Mannis, with the exception of the handwritten change that your Honor noted and two of the handwritten changes, and after having considered all the facts, including the ones that I

just adverted to, recommended that order for your Honor's signature, having been fully apprised of all prior developments in the case, the age of the case, the priof efforts of this plaintiff to secure discovery in the case, the fact that this is not exactly a small case, this is a case in which the plaintiff seeks $285,000 in damages, being apprised that Mr. Fullana is in Puerto Rico, the records they want are in Puerto Rico, in parts, etc., etc., and the Magistrate considered all of this and recommended --

THE COURT: Have all these records been produced now?

MR. HOROWITZ: As far as I know, your Honor, with respect to the principal claim by the plaintiff, they have been produced, and my clients are prepared to give affidavits to that effect. Your Honor may or may not recall that on motion made by me almost two years ago the Court, back in March or April of last year, granted us permission to file an amended answer containing a counterclaim.

They have requested, although I don't believe it is the subject of any court order, production of certain documents with respect to the counterclaims. The answer is, I believe, yes with regard to their claim and not with regard to the counterclaim, although I must say that there

may not be anything significant in the way of documents relating to the counterclaim.

THE COURT: Let me ask you this, then: Have your clients submitted an affidavit that they have complied or that there are no other documents to be produced?

MR. HOROWITZ: My clients haven't but are prepared to do so.

One further fact was that Mr. Fullana was physically present in my office on January 13th. He came there with the avowed prupose of discussing his testimony with me in preparation for the session that had been arranged for January 14th, and that date, a week or so in advance of the date contained in the Magistrate's proposed order, had been cleared with Mr. Parsons and Mr. Mannis.

THE COURT: Was there a date set for your client to file an affidavit that all documents had been produced as requested?

MR. HOROWITZ: Yes. If your Honor will look at the proposed order of the Magistrate, it provides that that be done by January 15th.

THE COURT: Was that done by January 15th?

MR. HOROWITZ: That was not done January 15th. Nothing has been done since January 12th because of the Court's order of January 12th and the fact that it would be

an exercise in futility, I suppose. to do anything until we know what the status is of the case.

If a default judgment is going to be granted, then there is no sense in preparing affidavits. If it is not going to be granted and we are going to proceed, we will immediately file such affidavits.

THE COURT: Is there some reason why such an affidavit could not have accompanied your motion for reconsideration? You say the man was here when?

MR. HOROWITZ: January 13th.

THE COURT: Is there some reason why you couldn't have attached an affidavit saying that all documents had been turned over?

MR. HOROWITZ: There is no reason, your Honor, other than, quite candidly, I suppose the answer is I didn't think of it on January 13th, because I had a rather enormous problem to deal with created by the Court's order of January 12th.

The other people who were supposed to sign such affidavits, Mr. Berger and Mr. Cohen, are both in New York City and there is no particular reason why late in the day on the 14th or on January 15th itself those affidavits could not have been delivered to counsel for plaintiff.

I will report to the Court that when I spoke

to --

THE COURT: January 22nd is tomorrow. Where is Mr. Fullana now?

MR. HOROWITZ: He is in Puerto Rico. I called your Honor's chambers -- I forget whether it was the 13th or the 14th, I believe it was the 13th, first thing in the morning -- spoke to the law clerk, and I said we had just become advised the day before, the afternoon before, of your Honor's order of January 12th, that I have the man coming in today and I would like to have --

THE COURT: You have the man coming in today? What does that mean?

MR. HOROWITZ: Mr. Fullana. I explained to the law clerk that this revolved about a deposition of Mr. Fullana and Mr. Fullana was going to be in my office on January 13th in the afternoon.

THE COURT: How was he going to be there? How did it happen he was going to be there on January 13th?

MR. HOROWITZ: Because Mr. Parsons and I agreed that his deposition be taken on the 14th.

THE COURT: When did you agree to that?

MR. HOROWITZ: Late in the week of January 5th, the preceding week. I am sorry. I stand corrected. Early in the day on January 12th, the same day your Honor

entered the order of January 12th, Mr. Parsons and I agreed that Mr. Fullana's deposition would be taken on January 14th.

I immediately advised Mr. Fulland by long distance telephone that the request that his deposition be taken on the 14th was acceded to by the counsel for the plaintiff and "I want to discuss your testimony with you and I want you in my office on the 13th," and he appeared in my office at roughly 3.30 p.m. that day.

I advised your Honor's law clerk of all this and I said the man is here, I couldn't keep him here indefinitely, I would like an audience with the Court, a conference, I advised Mr. Parsons I would make such request.

The law clerk asked me to hold the phone, that he was going in to see your Honor. He came back several moments later and said that your Honor did not want to see us in a conference, that anything I had to say I should say in a motion.

I made the motion on January 15th. The man returned to Puerto Rico, I believe, on January 15th or perhaps late in the day on the 14th.

THE COURT: What prevented you from making the application on the 12th of January, after you spoke to my law clerk and he told you to put it in writing?

MR. HOROWITZ: I didn't speak to him on the 12th, your Honor. I spoke to him on either the 13th or the 14th. Perhaps counsel for the plaintiff recalls. I spoke to them late in the day --

THE COURT: You just said late in the day of the 12th or earlier in the day of the 12th you spoke to them, and then I notified them of the endorsement on this motion.

MR. HOROWITZ: I believe they advised me late in the day on the 12th and I believe, although I am not sure, that it was that conversation late in the day of the 12th where I said to them, "I am going to call Judge Motley's chambers first thing in the morning on the 13th."

THE COURT: As I have said, this motion of yours was filed on the 15th of January, two days later, and your letters is dated January 15th also.

MR. HOROWITZ: On the 13th Mr. Fullana was in my office. As I had told counsel for plaintiff on tne 12th, in our late afternoon conversation, I would discuss with him whether there was any possibility of resolving this matter, that I would endeavor to get back to Mr. Parsons after talking about that subject with Mr. Fullana.

I called Mr. Parsons late in the day on the 13th and I said there was no possibility of resolving the

matter, and it may have been early in the morning on the 14th that I called your Honor's law clerk. I am not sure. Perhaps counsel recalls. But I am confused as to whether I called the Court on the morning of the 13th or the 14th.

But I think in the circumstances, your Honor, I moved expeditiously to file these motion papers. I filed them either one day or two days after speaking to your Honor's law clerk. I think it was one day.

THE COURT: Let me ask you this: What accounts for your client's failure to appear previously for his deposition, prior to the Magistrate's proposed order - that is, as to Mr. Fullana? What accounts for his failure to appear for more than a year? I gather he was notified sometime in December or September --

MR. HOROWITZ: I made a motion to withdraw as counsel in this case, and the reason I made that motion was that I had not been getting cooperation from my client, especially from Mr. Fullana.

I don't think, in view of the confidence of attorney-client, that I should comment any further than I have in the motion papers.

THE COURT: The evidence is that your client wilfully failed to appear for the taking of his deposition, and I am trying to find the date now when he was first

notified -- September 25, 1973. That is on page 2 of the affidavit of Judson Parsons dated June 11, 1975. On page 2 of that affidavit he cites an effort to get this pretrial discovery completed and says,

"Those efforts included, on September 25, 1973, a notice of deposition of defendant, Martin Cohen, Jack H. Berger and Pedro Fullana, all of whom acted on behalf of defendant in connection with the matters involved in this litigation."

The Magistrate's memorandum comes a year later, doesn't it?

MR. HOROWITZ: Your Honor, I think there is one other factor we have to throw in that hopper to make it complete. In 1974 I made a motion, early in '74, March or April, for the following relief: to transfer this case to the district court in Puerto Rico, for permission to amend the answer and interpose a counterclaim, and for the Court to direct that Mr. Fullana's deposition be taken in Puerto Rico.

One year later, approximately, this Court decided that motion, denied the application to transfer it to Puerto Rico --

THE COURT: What was the date of that?

MR. HOROWITZ: March or April 1975. I don't

know the precise date. The Court directed that we have permission to amend our answer and interpose a counterclaim and that Mr. Fullana's deposition be taken in New York City.

THE COURT: That was April '75.

MR. HOROWITZ: March or April.

MR. PARSONS: March 31st was the denial.

THE COURT: What year?

MR. PARSONS: '75.

MR. HOROWITZ: So it was not resolved until March of '75, your Honor.

THE COURT: Then what accounts for your defendant's failure to appear from March '75 to December '75?

MR. HOROWITZ: Your Honor, I suppose that it would not be appropriate for me to comment any further, in view of the evidence of attorney-client, other than to say --

THE COURT: If he has a justifiable excuse for not appearing, I don't know that you can also invoke the attorney-client privilege. He is here seeking relief on the ground that he has some good reason, I assume, for not appearing. So I don't know that you can ask for relief in

the court and at the same time stand on a privilege. You can't do that.

MR. HOROWITZ: Your Honor, I am not here to attempt to justify Mr. Fullana's failure to appear between March of 1975 and the date fo the conference before the Magistrate.

THE COURT: We are here because I am concerned with it. If you don't want to justify it, you don't have to, but that is why we are here, to determine whether a default judgment ought to be entered against your client, and, as far as I can see, the record is clear that your client wilfully failed to appear for his deposition, and that is why a default judgment is going to be entered against him, notwithstanding the recommendation of the Magistrate, because I disagree with it, that he is entitled to a second chance.

So for that reason the relief originally requested against your client is going to be granted unless, of coufse, the moving party doesn't wish that.

MR. PARSONS: I certainly do, your Honor.

MR. HOROWITZ: Your Honor, let me say that all of this has been before the Magistrate. The man, notwithstanding the prior situation, was in my office, was willing to cooperate, was willing to comply with the various

suggested orders of December of this year, that plaintiff's counsel were willing to go along with that, did not claim that they were prejudiced, and I think in the curcumstances, from December 1, 1975 through and including January 12th, they never asked for a default judgment, and I think it is a bit unusual to grant --

THE COURT: I am asking now if they are asking for it.

Are you asking for a default judgment?

MR. PARSONS: Yes, your Honor.

MR. HOROWITZ: Your Honor, I know what they are asking for now, and I suppose I would do the same thing, in light of your Honor's handwritten order of January 12, 1976. But that doesn't alter the fact that between the conference of December 1st and January 12th of this year they never said one word about a default judgment, the Magistrate never said one word about a default judgment, Mr. Fullana came here for his deposition, plaintiff did not claim they were prejudiced, and we are not dealing with a hundred dollars or a thousand dollars; the relief requested in the complaint is $285,000.

THE COURT: That is all the more reason why the defendant should have appeared. That is precisely why he should have been here, and I think the record is clear

that he wilfully failed to appear fro his deposition.

There is no excuse in the world why he couldn't have filed an affidavit setting forth that all the records requested had been produced.

MR. HOROWITZ: That was supposed to be filed by January 15th, your Honor --

THE COURT: You were acting on the assumption I was going along with that. You didn't have any court order permitting that and your client had plenty of time, even before January 12th, to submit such an order and get over here and get his deposition taken and get on with this, particularly in view of the fact that this was a 1973 case which was encompassed within the Court's memorandum relating to these cases which was sent to all counsel saying that these cases are going to be tried starting April 1st.

So this case was involved in that, in addition, and that is all the more reason why you should have gotten him here, which you didn't.

MR. HOROWITZ: I did get my client here.

THE COURT: That was long after the Magistrate's report. When this notice came out in October was the time to see that your client was complying with the Court's order.

MR. HOROWITZ: Your Honor, there had been

various other proposals of the Magistrate that had been acted on, I thought rather routinely, by the Court, and I proveeded on the assumption that this one would as well. I don't know what else there is to say.

THE COURT: Thank you, gentlemen.

MR. HOROWITZ: Your Honor, I have two requests. Firstly, if your Honor is going to sign the order --

THE COURT: I have already signed it, just a minute ago.

MR. HOROWITZ: Your Honor, I would like to make a couple of comments on the order itself.

Firstly, that order contains no reference to the proceedings before Magistrate Schreiber or the proposed order. There is no secret that I am going to the Court of Appeals, and I want --

THE COURT: The record is clear. That is in the record. And I said in my order of January 12th, "The Court rejects the proposed order prepared by Magistrate Schreiber on December 9, 1975 and grants the plaintiff's motion for sanctions against defendant for their refusal to comply."

So there is no attempt to hide the fact that the Magistrate suggested the order that he did on December 9th. It is right in there that I rejected his report, and

I find that his report, as I have indicated, comes months after your client failed to appear for his deposition.

As I told you, it is my ruling that I am not bound by the Magistrate's reports in these matters. The Magistrate is not a district judge. And I have gone over this, and the record is extensive and clear that your client wilfully disobeyed the orders of the Court.

So you can go to the Court of Appeals and we will find out whether your client can wilfully disobey a court order.

MR. HOROWITZ: One final request, if I may, your Honor. I would like to request a thirty day stay of enforcement of the judgment that will ultimately be entered. I will be filing a notice of appeal and proceeding with an appeal.

THE COURT: Well, you have to file a bond for an appeal which would automatically stay this judgment, wouldn't it?

MR. HOROWITZ: I have to file a notice of appeal within thirty days after the entry of the judgment. What I am requesting is a thirty day stay of the judgment, which is the time within which I would file a notice of appeal and the bond.

THE COURT: You want a thirty day stay of the

judgment pending the filing of a notice of appeal?

MR. HOROWITZ: Yes, your Honor.

THE COURT: Do you wish to be heard on that?

MR. PARSONS: Your Honor, I guess --

THE COURT: I think he can't enforce the judgment until the time for appeal has expired.

MR. HOROWITZ: That is not true, your Honor.

MR. PARSONS: I would like to suggest, your Honor, since he will have to file a bond to appeal to stay things, that I guess I would not object to that. But I think your Honor awarded us counsel fees.

THE COURT: Yes, counsel fees and expenses.

MR. PARSONS: I suggest that that not be stayed, your Honor, but I suggest that one of the ways to make these discovery rules work is that when those things are imposed that they be dealt with expeditiously and paid expeditiously.

This doesn't go into our pocket but goes into the client's pocket. The client has incurred those expenses and will be reimbursed for them.

THE COURT: It seems to me -- I guess we could get the rules out, but it seems to me -- you can file a notice of appeal and the required bond and that automatically stays this judgment and that is what you should do.

MR. HOROWITZ: What I am saying to the Court is that you don't file a 300 some-odd thousand dollar bond overnight. You have to satisfy bonding companies --

THE COURT: There is a ten day rule, I am sure, at least, with respect to the entry of any judgment here. You check on the rules and write out whatever you want me to do. But, as I have indicated, I think what you should do is file a notice fo appeal and the required bond, which would stay this judgment.

Thank you, gentlemen.

- - -

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

US DISTRICT COURT
FILED
JAN 22 1976
S.D. OF N.Y.

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

ORDER & JUDGMENT IN DEFAULT

#76,061

This cause came to be heard on plaintiff's cross-motion dated June 13, 1975 for an order pursuant to Federal Rule of Civil Procedure 37 imposing sanctions upon the defendant and awarding plaintiff reasonable expenses, including attorneys' fees, incurred by reason of defendant's conduct; and

WHEREAS by order of this Court filed on March 5, 1974 defendant was ordered to produce on or before February 26, 1974 documents whose production was sought by plaintiff's request for production of documents dated September 25, 1973 and to appear on April 17, 1974 for its oral examination by Mr. Fullana; and

WHEREAS by order of this Court filed on September 11, 1974 plaintiff's previous motion, dated December 13, 1973, for an order compelling discovery or imposing sanctions was dismissed as moot based upon this Court's order filed March 5, 1974; and

WHEREAS by order of this Court filed on November 11, 1974, after counsel for both parties having been heard and pursuant to findings by this Court that the defendant had failed to comply with this Court's order of March 5, 1974, insofar as it directed the production of documents, and that no objection had been made to plaintiff's request for production, defendant was

ordered to produce on or before December 15, 1974 those documents responsive to plaintiff's request for production of documents dated September 25, 1973, including those documents specifically requested during the deposition of defendant held on February 28 and March 5, ~~1975~~ 1974; and

CBM

WHEREAS said order of November 11, 1974 further included a recommendation that, failing said production, defendant's answer be stricken and judgment be entered for plaintiff; and

WHEREAS at a conference with Magistrate Schreiber held on December 18, 1974 he orally directed the defendant to supply affidavits indicating that plaintiff's request for documents has been complied with fully, if no further documents are produced; and

WHEREAS the defendant has failed to comply with the aforesaid orders of this Court insofar as they require the production of documents or affidavits in lieu thereof and defendant's appearance for its oral examination by Mr. Fullana; and

WHEREAS defendant's failure to comply has been due to willfulness, rather than an inability to comply, and defendant has no justifiable reason for noncompliance; NOW IT IS HEREBY

ORDERED pursuant to Federal Rule of Civil Procedure 37(b)(2) that:

(1) this Court has jurisdiction of the parties and of the subject matter;

(2) the allegations of the complaint in this action are taken to be established for purposes of this action;

(3) the amended answer filed by the defendant in this action is stricken and the counterclaims against the plaintiff are dismissed with prejudice;

(4) the defendant is precluded from opposing the claims asserted in the complaint and from supporting the defenses and claims asserted in its amended answer and counterclaims;

(5) a judgment by default against defendant shall be entered by the Clerk of this Court in the amount of $285,000, plus interest at the rate of six percent per annum from the date plaintiff's cause of action arose, which was on or about November 1, 1972, plus reasonable expenses, including plaintiff's attorneys' fees, in the amount of $3743.50 incurred by defendant's unjustified failure to comply with the orders of this Court; and

CBM

(6) plaintiff shall file with the Clerk of this Court a bill of costs which shall be taxed against defendant.

Dated: New York, New York
January 16, 1976

S/ CONSTANCE BAKER MOTLEY
United States District Judge

JUDGMENT ENTERED 1-22-76

/S/ RAYMOND F. BURGHARDT
CLERK

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JUDSON A. PARSONS, JR., being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for plaintiff in this action. I make this affidavit in support of plaintiff's application for reasonable expenses, including attorneys' fees, incurred by reason of the defendant's conduct in this action and, specifically by reason of the defendant's failure to obey the orders of this Court in this action.

2. As a result of the defendant's failure to comply with this Court's orders to produce documents and to appear for its oral examination, it was necessary for me and associates in my firm to prepare plaintiff's cross-motion, dated June 13, 1975, for an order pursuant to Federal Rule of Civil Procedure 37 imposing sanctions upon the defendant and awarding plaintiff reasonable expenses, including attorneys' fees, incurred by reason of the defendant's conduct. In connection with the cross-

motion, it was also necessary for either me or an associate of my firm to attend a conference with Magistrate Schreiber, and to engage in various telephone calls and correspondence with the Court, the plaintiff and counsel for the defendant.

3. Based upon a review of time records submitted by attorneys and law clerks of my firm, the amount of time attributable to the cross-motion and to the defendant's failure to comply with prior orders of this Court is 5 hours of partners' time, 53 hours of associates' time, and 6.5 hours of law clerks' time, or a total of 64.5 hours. Based upon the normal billing rates, at which plaintiff has been billed by us, the plaintiff should be awarded $3,371.50 for attorneys' and law clerks' time spent by reason of the defendant's noncompliance with the orders of this Court.

4. In addition to the above amount, expenses and disbursements for stenography and reproductions in connection with the plaintiff's cross-motion and the defendant's noncompliance with this Court's orders were incurred in the amount of approximately $372. Thus, the total amount of plaintiff's award for reasonable expenses should be $3,743.50.

5. Plaintiff has already been billed for all professional services rendered and expenses and disbursements incurred prior to September 30, 1975 as a result of the defendant's failure to comply with the orders of this Court. Plaintiff has paid in full the amount it has already been billed and plaintiff will shortly be billed for the balance which were incurred in the last quarter of 1975.

Judson A. Parsons, Jr.

Sworn to before me this 14th
day of January, 1976.

Notary Public

BOB D. MORRIS
NOTARY PUBLIC, State of New York
No. 31-4612752
Qualified in New York County
Commission Expires March 30, 1977

2-19-76

U.S. District Court
Filed
Feb. 9, 1976
S.D. of N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

STIPULATION & Order Substituting Attorneys

73 Civ. 2422

(CBM)

IT IS HEREBY STIPULATED by and among the undersigned that the firm of Milbank, Tweed, Hadley & McCloy be substituted as attorneys for defendant in place of Weiss Rosenthal Heller & Schwartzman for reasons set forth in the annexed affidavit.

Dated: New York, New York
February 3, 1976

WEISS ROSENTHAL HELLER & SCHWARTZMAN

By _____
A Member of the Firm

295 Madison Avenue
New York, N.Y. 10017

Retiring Attorney for Defendant

MILBANK, TWEED, HADLEY & McCLOY

By _____
A Member of the Firm

1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant

INMOBILIARIA MELIA DE PUERTO RICO, INC.

By _____

MILBANK FILE
Feb. 4, 1976

SO ORDERED: Feb. 4, 1976

s/ Constance Baker Motley
U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED, Plaintiff, -against- INMOBILIARIA MELIA DE PUERTO RICO, INC., Defendant.	AFFIDAVIT 73 Civ. 2422 (CBM)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PEDRO FULLANA, being duly sworn, says:

1. I am the Executive Vice President of defendant and make this affidavit in support of the application for the Court's approval of the substitution of the firm of Milbank, Tweed, Hadley & McCloy as attorneys for defendant.

2. This action was commenced in 1973. An answer has been filed on behalf of defendant, and discovery commenced. By order dated January 21, 1976, this Court directed, among other things, entry of a default judgment against defendant for the full amount of the damages alleged in the complaint. As present counsel has previously indicated its desire to withdraw and in view of developments in the action, it has been determined that it would be in the best interests of defendant to substitute counsel which has also represented the entities primarily responsible for the financing of the project at issue.

3. It is respectfully submitted that the substitution of attorneys requested by defendant and provided for in the annexed stipulation is appropriate and should be approved pursuant to Rule 4(c) of the General Rules for the Southern and Eastern Districts of New York.

Sworn to before me this
3rd day of February, 1976.

JANICE K. JOHNSON
NOTARY PUBLIC, State of New York
No. 24-4710000
Qualified in Kings County
Cert. Filed in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED, Plaintiff,	73 Civ. 2422 (C.B.M.)
- against -	NOTICE OF APPEAL
INMOBILIARIA MELIA DE PUERTO RICO, INC., Defendant.	

Notice is hereby given that Inmobiliaria Melia de Puerto Rico, Inc., the defendant in this action, hereby appeals to the United States Court of Appeals for the Second Circuit from the order and default judgment entered in this action on the 22nd day of January 1976 and the ruling of January 21, 1976 denying defendant's request for an order reconsidering and vacating the order and default judgment.

Dated: New York, N.Y.
February 20, 1976

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for defendant

TO: DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
140 Broadway
New York, N.Y. 10005
Attorneys for plaintiff